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In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

CLIFFORD BAILEY, ET AL.

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES T. COGDELL

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in these cases.

OPINIONS BELOW

The opinions of the court of appeals (Apps. A, F, *infra*, 1a-91a, 100a-113a) are not yet reported.

(1)

JURISDICTION

The judgments of the court of appeals (Apps. B, G, *infra*, 93a-94a, 114a-115a) were entered on July 12, 1978. The government's petitions for rehearing and suggestion for rehearing en banc (Apps. D, E, H, I, *infra*) were denied on October 19, 1978. On November 13, 1978, The Chief Justice extended the time within which to file a petition for a writ of certiorari to December 18, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the federal escape statute, 18 U.S.C. 751(a), prohibits escape only from "normal aspects of 'confinement'" and does not prohibit an escape motivated by a prisoner's desire to avoid onerous jail conditions.

2. Whether duress may be raised as a defense in an escape prosecution where the defendant (a) was not threatened with imminent harm from harsh prison conditions at the time of the escape and (b) remained in hiding following the escape and did not return to lawful authorities or pursue civil, administrative, or judicial remedies to cure the claimed improper prison conditions.

STATUTE INVOLVED

18 U.S.C. 751(a) provides:

Whoever escapes or attempts to escape from the custody of the Attorney General or his au-

thorized representative, or from any institution or facility in which he is confined by direction of the Attorney General, or from any custody under or by virtue of any process issued under the laws of the United States by any court, judge, or magistrate, or from the custody of an officer or employee of the United States pursuant to lawful arrest, shall, if the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense, be fined not more than \$5,000 or imprisoned not more than five years, or both; or if the custody or confinement is for extradition or by virtue of an arrest or charge of or for a misdemeanor, and prior to conviction, be fined not more than \$1,000 or imprisonment not more than one year, or both.

STATEMENT

A. Respondents Bailey, *et al.*

Following a jury trial in the United States District Court for the District of Columbia, respondents Bailey, Cooley, and Walker were convicted of escaping from the custody of the Attorney General, in violation of 18 U.S.C. 751(a).¹ They were sentenced to five years' imprisonment, to be served consecutively to sentences previously imposed.²

¹ Respondents were also charged with "prison breach" in violation of D.C. Code 22-2601. The jury was instructed that if they found the defendants guilty under the federal escape statute, they should not consider the charge under the D.C. Code (Tr. 804).

² Bailey was serving a 23-year sentence for bank robbery and attempted escape. Walker was serving a 15-year sentence for bank robbery. They had been brought from other federal

The government's evidence showed that in the early morning hours of August 26, 1976, respondents Bailey, Cooley, and Walker escaped from the New Detention Center of the District of Columbia Jail by climbing through a low-level window (App. A, *infra*, 37a; Tr. 562). They were apprehended by FBI agents in the District of Columbia on November 19, September 17, and December 13, 1976, respectively (Tr. 65-66).

Respondents did not dispute at trial that they had fled from the jail without permission. They claimed, however, that their escape was excusable because of intolerable conditions at the jail. They produced testimony from other jail inmates that fires were frequently set in the cellblock where respondents were confined and that the resulting smoke often made breathing difficult for several hours (Tr. 150-152, 161-163, 203-206, 354, 377-379, 390). Testimony was also elicited that, several weeks prior to the escape, Bailey and Cooley were assaulted by guards armed with blackjacks and that, sometime in August, guards threatened to kill Bailey if he testified in a case in which he had been subpoenaed as a witness (Tr. 154, 360-370, 373-375, 380, 389, 393, 404,

prisons to the District of Columbia Jail pursuant to writs of *habeas corpus ad testificandum* issued by the Superior Court of the District of Columbia. Cooley was serving a five-year sentence in the District of Columbia Jail following his conviction for unlawfully possessing an unregistered firearm (Tr. 13-17, Gov't Exs. 1, 1-A, 1-B, 2, 2-A, 3, 3-A, 4, 5, 6).

469).³ Walker also sought to demonstrate that he was receiving inadequate medical treatment for an alleged epileptic condition (*e.g.*, 438-458, 603-604, 625, 650-652, 678-680).⁴ Finally, Cooley testified that, on the morning of the escape, Bailey and Walker threatened to kill him if he did not join them. He admitted, however, that he left the jail by himself and did not know whether Bailey and Walker left at all (Tr. 402, 406, 424-425).

Walker and Bailey asserted that they had taken steps to contact police authorities following their escape. Bailey claimed that he "had [the FBI] called;" Walker testified that he "kept a constant rapport with the F.B.I." and attempted to negotiate terms for his surrender (Tr. 564, 710-711, 715-716). These claims were contradicted by the testimony of FBI agents (Tr. 730-732). Each of the respondents admitted that they did not surrender following their escape but remained in hiding instead (Tr. 418-419, 564, 721-722).

At the close of the evidence, respondents requested an instruction on the defense of duress on the theory

³ Neither respondent reported to jail officials that the alleged assaults or threats had occurred (Tr. 246, 255, 273). Correction officers testified that no such incidents took place (Tr. 355, 741, 742).

⁴ The evidence presented to support this claim was a medical history provided by respondent Walker himself. The claimed epileptic condition was undiagnosed by medical authorities. Despite this lack of substantiation, medication had been prescribed by a jail physician to control the alleged seizures (Tr. 438-439, 680-681).

that their escape was compelled by the allegedly intolerable jail conditions. The trial judge ruled, however, that this defense was unavailable because the respondents had failed to surrender to lawful authorities following their escape (Tr. 725, 777). The judge instructed the jury as follows (Tr. 806):⁵

You are instructed as a matter of law that conditions at the District of Columbia Jail or the new detention center, no matter how burdensome or restrictive an individual inmate may find them to be, are not a defense to the charges in this case, nor justification for the commission of the offense of escape.

The judge also instructed the jury that escape is a "general intent" offense, and that a general intent is only "the purpose to do something, the will to do the act. It means the act was done consciously and not inadvertently or accidentally" (Tr. 803).

⁵ The court elaborated on this in its instruction (Tr. 806-807):

Now, the court permitted the defendants to introduce this evidence and to seek to show that following their escape they turned themselves in, for if one, after escaping has turned himself in, then the defense of coercion or duress may be brought to the attention of the jury as a defense, but only if a defendant turns himself in.

Now, there are recognized procedures for this to be done, and requisite protections insured by such action. As the Court heard the evidence, that was not done in this case. So the Court felt that it was incumbent upon the court to assume responsibility for this aspect of the case, and to take it out of the case in effect. So, you are not to consider the defense of duress or coercion for the reasons stated. The defendants did not turn themselves in.

B. Respondent Cogdell

Respondent Cogdell was indicted with the other respondents for the same escape incident at the District of Columbia Jail. His case was severed, however, and tried before a separate jury. He was convicted of escape in violation of 18 U.S.C. 751(a) and sentenced to five years' imprisonment (Cogdell Tr. of July 6, 1977, at 31).

The evidence showed that Cogdell escaped from the District of Columbia Jail on August 26, 1976, and was apprehended on September 28, 1976, while hiding in the closet of a residence in Hyattsville, Maryland (I Cogdell Tr. 26, 56).⁶ Cogdell offered to prove at trial that his escape was compelled by intolerable conditions at the District of Columbia Jail (I Cogdell Tr. 14). Since Cogdell had not surrendered to authorities following his escape, however, the trial judge ruled that Cogdell was not entitled to raise the proposed defense and excluded the proffered evidence (I Cogdell Tr. 11-14).

C. The Decision of the Court of Appeals

The court of appeals, with one judge dissenting, reversed the convictions in both cases and remanded

⁶ Cogdell had been brought to the District of Columbia Jail under a writ of *habeas corpus ad prosequendum* to appear for a status call in the District of Columbia Superior Court, where he had been indicted for forgery, unauthorized use of a vehicle, and carrying a pistol without a license (I Cogdell Tr. 22-29). He was transferred to the District of Columbia Jail from the Fairfax County Jail in Virginia, where he had been committed following a state conviction for uttering and delivering a forged instrument (App. F, *infra*, 102a & n.3).

for new trials. The majority concluded that the trial court erred in its instructions concerning the intent element of the escape offense and in its imposition of a "return requirement" on the defense of duress.

a. The court reasoned that any attempt to label the escape offense as a "general intent" crime or a "specific intent" crime only impedes analysis (App. A, *infra*, 7a). The court stated that the word "escape" is not "self-defining," but that it implies "an intent to leave and not to return" (*ibid.*, quoting *United States v. Nix*, 501 F.2d 516, 518 (7th Cir. 1974)), or "an intent to avoid confinement" (App. A, *infra*, 8a). The court noted that the "intent to avoid confinement" is ordinarily established merely by proof of the act of fleeing jail (*id.* at 9a). The court reasoned, however, that where the defense offers "evidence of jail conditions, threats, and violence such as that presented [by respondents]," it is at least questionable whether the escape was based on an intent to avoid "confinement" or an intent to avoid abnormal and onerous conditions present at the jail (*id.* at 10a). The court sharpened its exposition in a footnote, explaining that the intent element of the escape offense is the intent to avoid "normal conditions of confinement" (*id.* at 9a n.17; emphasis in original):

[I]f a prisoner offers evidence to show that he left confinement *only* to avoid conditions that are not normal aspects of "confinement"—such as beatings in reprisal for testimony in a trial, failure to provide *essential* medical care, or homo-

sexual attacks—the intent element of the crime of escape may not be satisfied.

On this basis, the court concluded that the trial court erred in instructing the jury that the intent element of the crime encompassed only the general intent consciously and willfully to flee from confinement. Instead, where the issue of intent is raised by the defense, the court ruled that it is for the jury to decide whether the defendant was motivated by the improper desire to avoid "confinement" per se, or the permissible desire to avoid onerous conditions "that are not normal aspects of confinement" (*id.* at 9a n.17, 11a).⁷

b. The court of appeals also held that it was error for the trial judge to refuse to submit the defense of duress to the jury on the ground that respondents failed to surrender to lawful authorities following their escape. The court observed initially that the respondents' evidence of threats and harsh conditions of confinement "does not establish a classic [duress or] necessity defense" (*id.* at 17a n.29). As the court noted (*id.* at 16a n.29):

⁷ Where the issue of intent is raised by the defendant, the court stated (App. A, *infra*, 11a) that the

prosecutor may argue that the conditions allegedly necessitating the defendant's departure from custody were relatively mild, that alternative remedies short of escape (*e.g.*, resort to prison authorities or the courts) were available, or that the defendant failed to return voluntarily to custody once the conditions allegedly motivating the escape no longer threatened him.

The duress defense normally requires a defendant to establish that he engaged in criminal conduct only because he was compelled to do so by another person's unlawful threat which caused him reasonably to believe that he must commit a crime to avoid imminent death or serious bodily harm to himself or a third person.

The evidence of harsh prison conditions in this case concerned events preceding the escape, and there was no evidence that, at the time the escape occurred, the respondents faced imminent harm from the claimed improper jail conditions (*id.* at 63a) (Wilkey, J., dissenting). The court of appeals, however, dismissed the requirement of imminent or "immediate harm" as "particularly inappropriate in escape cases, where a possibility of escape * * * is not likely to remain available until a substantial threat becomes 'immediate' * * *" (*id.* at 21a n.39). The court concluded that there was sufficient evidence of harsh conditions for the defense of duress to be submitted to the jury in this case.⁸

The court held that the district court erred in refusing to submit the duress defense to the jury because of respondents' failure to return to lawful custody following their escape. The court acknowledged that both state and federal decisions have held that the defense of duress may be raised in escape prosecutions only where the defendant has voluntarily returned to custody following the escape (*id.*

⁸ In so holding, the court of appeals noted that the district court had indicated that it would have submitted the duress defense to the jury but for respondents' failure to return to lawful custody following their escape (*id.* at 22a-23a n.43).

at 23a, citing, *e.g.*, *United States v. Michelson*, 559 F.2d 567 (9th Cir. 1977); *People v. Lovercamp*, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (1974). The court reasoned, however, that these cases stand only for the proposition that the duress defense "lasts only as long as the [conditions justifying escape continue]" (App. A, *infra*, 24a). The court concluded that, where a defendant fails to return to custody after the escape, the question whether "the conditions establishing the defense * * * continue for the period [the] prisoner remains at large" (*id.* at 26a n.52) is a question for the jury, not the trial judge, to determine (*id.* at 25a-26a).

c. Judge Wilkey dissented. He noted first that the majority's formulation of the intent element of the escape offense is a radical departure from the common law definition of the crime, which, in the absence of any contrary legislative history, Congress presumably adopted in its enactment of 18 U.S.C. 751(a) (App. A, *infra*, 74a-78a). He concluded that the majority's construction of the federal statute to prohibit escape only from "normal aspects of confinement" is in conflict with numerous decisions under 18 U.S.C. 751(a) and analogous escape statutes, and that, by weakening the prohibition against escape, it threatens serious consequences for the safe administration of federal custodial facilities (*id.* at 78a-80a, 51a).

With regard to the defense of duress, Judge Wilkey stated that the relevant question

is not whether a particular condition is or is not a "normal" incident of prison life, but, rather, is whether the condition is such as to raise in the defendant's mind a well-grounded apprehension of serious bodily injury or death [*id.* at 89a-90a].

The respondents' claims of harsh prison conditions, however, concerned incidents that occurred a considerable time prior to the escape. Judge Wilkey noted that there was nothing in the evidence to suggest that at the time of the escape the respondents were acting in response to any imminent threat of death or serious bodily injury (*id.* at 63a-64a). He therefore concluded that respondents' claims were insufficient as a matter of law to establish the defense of duress (*ibid.*).

The dissent noted further that, because of the significant governmental interest in assuring that prisoners serve their lawful sentences, courts have consistently held that the defense of duress may not be raised in escape prosecutions unless the prisoner reports to proper authorities after he attains a position of safety from the immediate threat (*id.* at 53a-59a, citing, e.g., *United States v. Michelson*, *supra*; *Stewart v. United States*, 370 A.2d 1374 (D.C. Ct. App. 1977); *People v. Lovercamp*, *supra*). Since a prisoner who escapes from conditions constituting duress may turn to numerous lawful means by which to remedy improper confinement conditions,⁹ courts have imposed

⁹ "He can turn, for example, to the community, to public agencies, to public or private legal services, to politicians, to church groups or other private organizations that are in a

a duty on the escapee, once free, to pursue these legitimate means of redress, rather than to pursue self-help through continued criminality [App. A, *infra*, 59a].

REASONS FOR GRANTING THE PETITION

In its decision in this case, the court of appeals has departed radically from prior analysis of the crime of escape. The court's conclusion that escape constitutes a crime only when the prisoner is acting with the intent to avoid "normal conditions of confinement" is a novel interpretation of the offense; it draws no support from the statute and is in conflict with numerous state and federal decisions. The court's further conclusion, that a defense of duress based on harsh prison conditions may be raised even though the prisoner has failed to avail himself of lawful civil remedies and has remained in hiding over a prolonged period, converts the crime of escape into a self-help remedy for undesirable prison conditions. Under the court of appeals' analysis, the primary focus of future escape trials will be a factual assessment of the acceptability or normality of conditions of confinement.¹⁰ Neither reason nor precedent, however, supports the court's conclusion that Congress in-

position to take the action necessary to protect him from untoward danger once he returns to custody" (*id.* at 59a) (Wilkey, J., dissenting).

¹⁰ As Judge Wilkey noted in his dissent, "the circumstances of prison life are such that at least a colorable, if not credible, claim of duress * * * can be raised with respect to virtually every escape * * *" (App. A, *infra*, 51a).

tended to allow prisoners the option of self-help by escape as an alternative to lawful civil remedies for the correction of improper custodial conditions. Moreover, by weakening the prohibition against prisoner escape, the decision in this case threatens to subvert prison discipline and endanger corrections personnel.

1. The court of appeals' reformulation of the crime of escape to require proof of a specific intent to avoid "normal" incidents of confinement is without support in the common law or the history of the statute. The offense of escape at common law was a general intent crime that required proof only of a voluntary, unauthorized departure from the physical limits of lawful custody. App. A, *infra*, 74a (Wilkey, J., dissenting); Perkins, *Criminal Law* 501-504 (2d ed. 1969); 3 *Wharton's Criminal Law and Procedure* 764 (1957); 1 Burdick, *Law of Crime* 467 (1946).¹¹ As Judge Wilkey observed in his dissent, there is nothing in the language or history of the federal escape statute that reflects any intent to alter the common law elements of this offense. Indeed, the words of the statute speak in the broadest terms in prohibiting "escape from * * * custody." 18 U.S.C. 751(a).

¹¹ The requirement of voluntariness means only that the prisoner was aware of and intended his physical action. See, e.g., *Model Penal Code* § 2.01 (Tent. Draft No. 4, 1955); Perkins, *supra*, at 749. A "voluntary" act is an act that is the product of the actor's will, regardless whether the actor's will is freely exercised. 1 Burdick, *supra*, at 260-262. If the actor's will is coerced, the act remains "voluntary," but the defense of duress may be applicable. *Ibid.* See pages 16-18, *infra*.

Following the ordinary rule that words used in a statute are presumed to possess their common-law meaning where there is no evidence in the legislative history to the contrary,¹² federal decisions have consistently construed the escape statute to require only the general intent to depart from the boundaries of lawful custody. E.g., *United States v. Jones*, 569 F.2d 499 (9th Cir. 1978); *United States v. Cluck*, 542 F.2d 728, 731 n.2 (8th Cir.), cert. denied, 429 U.S. 986 (1976); *United States v. Woodring*, 464 F.2d 1248, 1251 (10th Cir. 1972). See also *United States v. McCray*, 468 F.2d 446, 448 (10th Cir. 1972); *United States v. Chapman*, 455 F.2d 746, 749 (5th Cir. 1972); *Chandler v. United States*, 378 F.2d 906, 908 (9th Cir. 1967). By adding a new element to the crime of escape, the decision of the court of appeals in this case conflicts with these decisions.¹³

¹² *Morissette v. United States*, 342 U.S. 246, 263 (1952).

¹³ The court of appeals' reliance (App. A, *infra*, 6a-8a) on *United States v. Nix*, 501 F.2d 516 (7th Cir. 1974), is misplaced. In *Nix*, the court of appeals stated that the intent element of the crime of escape is the "intent to avoid confinement." 501 F.2d at 519. The court concluded (*id.* at 519-520; footnotes omitted):

If the defendant offers evidence that he was intoxicated at the time of the offense, the jury must be instructed to consider whether he was so intoxicated he could not form an intent to escape.

As Judge Wilkey pointed out in his dissent (App. A, *infra*, 79a), *Nix* stands for the proposition that intoxication should be a defense to escape regardless whether escape is a general intent or specific intent crime. *Nix* provides no support for the conclusion in this case that the "intent to avoid confinement" that is proscribed by the escape statute is the narrow intent to avoid "normal aspects of confinement" (App. A, *infra*, 9a n.17).

Moreover, the holding of the court of appeals would make proof of the "normality" or "non-normality" of conditions of confinement relevant in practically every escape prosecution. See note 10, *supra*. The court's formulation of the crime would impose upon the jury the ultimate responsibility of determining appropriate and normal conditions of confinement.¹⁴ But there are no adequate standards by which the jury can be guided in this inquiry. As a result, escape prosecutions will become wide-ranging investigations into the adequacy of prison conditions, rather than a means of enforcing lawfully imposed criminal sentences. The very ambiguity created in the application of the escape statute under the court of appeals' analysis offers incentives for prisoners to attempt the self-help remedy of escape, rather than pursuing lawful administrative and judicial remedies for allegedly impermissible prison conditions.

2. The court of appeals also held that evidence of harsh prison conditions may create a defense of duress to an escape prosecution (a) even if the threatened harm is not imminent at the time of the escape (App.

¹⁴ The inevitable effect of an acquittal would be that the jury would be dictating to prison administrators the conditions of confinement that are normal and appropriate and that must be maintained to make escape unlawful. Such an interpretation of the escape offense is, of course, inconsistent with this Court's admonition that the determination of prison administrators is entitled to great deference in the evaluation of appropriate conditions of confinement. *E.g.*, *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 127 (1977); *Pell v. Procunier*, 417 U.S. 817, 827 (1974).

A, *infra*, 21a n.39),¹⁵ and (b) even if the defendant, after escaping, remains in hiding for a prolonged period and fails to report to lawful authorities or seek administrative or judicial correction of the claimed improper conditions (*id.* at 23a-26a & n.52).

a. The court of appeals conceded (App. A, *infra*, 16a n.29) that, except for respondent Cooley (who claimed that he was forced to leave jail by the threats of respondents Bailey and Walker),¹⁶ the respondents' evidence of harsh prison conditions does

not fit within the standard definition of * * * duress * * * [which] normally requires a defendant to establish that he engaged in criminal conduct only because he was compelled to do so by another person's unlawful threat which caused him reasonably to believe that he must commit the crime to avoid imminent death or serious bodily [injury]. * * *

See also *United States v. Wood*, 566 F.2d 1108 (9th Cir. 1977); *Shannon v. United States*, 76 F.2d 490 (10th Cir. 1935). As Judge Wilkey pointed out in dissent, the respondents' evidence related to past incidents and not to imminent threatened harm (*id.* at 63a-64a).¹⁷ The majority opinion, however, simply

¹⁵ See pages 9-10, 12 & note 7, *supra*.

¹⁶ As Judge Wilkey pointed out in dissent, even Cooley's claim was insufficient because he "testified that he had indeed not been forced to leave prison by Walker and Bailey" (App. A, *infra*, 63a; emphasis in original). See page 5, *supra*.

¹⁷ The disruption of prison discipline and the danger to security personnel and the general public from an escape is readily apparent. Courts have consistently held that harsh

severed the immediacy requirement from the duress defense by stating that the requirement is "inappropriate in escape cases, where a possibility for escape * * * is not [always] available [at the time the threatened harm is imminent]" (*id.* at 21a n.39).

The court of appeals' amputation of the immediacy requirement in escape cases is supported neither by reason nor precedent. If the defendant was not acting from fear of imminent harm, there is no reason to provide him the option of escape as an alternative to recourse to lawful administrative and judicial remedies. The decision in this case is unparalleled in its suggestion that, where an individual has available to him both lawful and unlawful means of averting threatened future harm, society permits the individual to chose the unlawful course.

b. The court of appeals extended its holding even further in this regard by stating that, after the defendant has escaped, his continued refusal to report to authorities is excusable under the theory of duress "if the conditions establishing the defense * * * continue for the period a prisoner remains at large" (App. A, *infra*, 26a n.52). Thus, even if there was no imminent threatened harm at the time of the escape, the prisoner may remain at large with impunity until such time as the harsh conditions of confinement are corrected.

conditions of confinement do not alone afford an adequate basis for asserting the defense of duress. *E.g.*, *Dempsey v. United States*, 283 F.2d 934 (5th Cir. 1960).

Here too the decision of the court of appeals conflicts with several federal and state decisions. Other courts have held that, when an imminent threatened harm justifies an escape under the theory of duress, the prisoner must immediately report to proper authorities after the escape and seek a lawful civil remedy for the threatened harm. *People v. Lovercamp*, *supra*, 43 Cal. App.3d at 831-832, 118 Cal. Rptr. at 115; *State v. Boleyn*, 328 So.2d 95 (La. 1976). See *United States v. Boomer*, 571 F.2d 543, 545 (10th Cir. 1978); *United States v. Michelson*, 559 F.2d 567, 570 (9th Cir. 1977). As the Ninth Circuit explained in *Michelson*, (*id.* at 570), while duress

may shield the escapee from the imposition of additional punishment, it does not commute the sentence previously imposed. * * * [A]n escape will not be excused by reason of duress if the escapee fails to submit to proper authorities immediately after attaining a position of safety. * * * [W]hen an escapee fails to submit to proper authorities, the asserted duress defense must be rejected because as a matter of law it does not negate the continued absence from custody.¹⁸

¹⁸ The court of appeals agreed that escape is a continuing offense. See also *United States v. Spletzer*, 535 F.2d 950, 954 (5th Cir. 1976); *Chandler v. United States*, 378 F.2d 906, 907 (9th Cir. 1967). The court concluded, however, that the failure of respondents to return to custody is a factor for the jury to consider and that the trial court erred in ruling on the issue as a matter of law (App. A, *infra*, 25a-26a). But, as the Ninth Circuit held in *Michelson*, the prisoners' failure to return makes the duress defense inapplicable as a matter of law. 551 F.2d at 570. Moreover, there was no factual dispute as to whether the respondents had failed to return or otherwise avail themselves of lawful remedies. See pages 5 & note 3, 7, *supra*.

The return requirement in escape prosecutions serves several significant purposes. It is a barrier against manipulation of the duress defense by those whose subsequent conduct reveals a lasting intent to avoid serving their lawful term of custody. It assures that when conditions constituting duress do exist, the prisoner will not be justified in remaining perpetually at large and thus avoid his lawful sentence. Finally, it requires the prisoner to seek redress of improper conditions by lawful, rather than criminal, conduct and thus favors institutional reform over personal rebellion.

CONCLUSION

The petition for a writ of certiorari should be granted.

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DECEMBER 1978

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1404

UNITED STATES OF AMERICA

v.

CLIFFORD BAILEY, APPELLANT

No. 77-1413

UNITED STATES OF AMERICA

v.

RONALD CLIFTON COOLEY, APPELLANT

No. 77-1502

UNITED STATES OF AMERICA

v.

RALPH WALKER, APPELLANT

Appeals from the United States District Court
for the District of Columbia

(D.C. Criminal No. 76-735)

Argued December 5, 1977

Decided July 12, 1978

David A. Levitt (appointed by this court) for appellant in No. 77-1404.

Robert A. Robbins, Jr. (appointed by this court) for appellant in No. 77-1413.

John Townsend Rich (appointed by this court) for appellant in No. 77-1502.

David G. Hetzel, Assistant United States Attorney, with whom *Earl J. Silbert*, United States Attorney, and *John A. Terry* and *Steven R. Schaars*, Assistant United States Attorneys, were on the brief, for appellee. *William D. Pease* and *James F. Hibey*, Assistant United States Attorneys, also entered appearances for appellee.

Before WRIGHT, Chief Judge, and MCGOWAN and WILKEY, Circuit Judges.

Opinion for the court filed by Chief Judge WRIGHT.

Dissenting opinion filed by Circuit Judge WILKEY.

WRIGHT, Chief Judge: Appellants in these criminal jury cases were convicted of violating 18 U.S.C. § 751 (a) (1976)¹ by escaping "from the custody of the Attor-

¹ § 751. Prisoners in custody of institution or officer

(a) Whoever escapes or attempts to escape from the custody of the Attorney General or his authorized representative, or from any institution or facility in which he is confined by direction of the Attorney General, or from

ney General" when they departed from the New Detention Center of the District of Columbia Jail ("Northeast One") in the early morning hours of August 26, 1976. Appellants Bailey and Walker had been brought from federal prisons where they were serving sentences for federal crimes to the D.C. Jail pursuant to writs of *habeas corpus ad testificandum* issued by the Superior Court of the District of Columbia²; appellant Cooley was serving a sentence in the D.C. Jail for a federal crime. Appellants raise various issues, both individually and in common, but only two require extended discussion³: whether the trial court erred in refusing to let the jury

any custody under or by virtue of any process issued under the laws of the United States by any court, judge, or magistrate, or from the custody of an officer or employee of the United States pursuant to lawful arrest, shall, if the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense, be fined not more than \$5,000 or imprisoned not more than five years, or both; or if the custody or confinement is for extradition or by virtue of an arrest or charge of or for a misdemeanor, and prior to conviction, be fined not more than \$1,000 or imprisoned not more than one year, or both.

Appellants were also charged with violating 22 D.C. Code § 2601 (1973), the "local" statute defining the offense of "prison breach." The jury was instructed that if they found the defendants guilty as charged under the federal escape statute, they should not consider the charge under the D.C. Code. Tr. 804.

² Courts issue writs of *habeas corpus ad testificandum* when it is necessary to bring a person who is confined in a prison or jail (usually serving a sentence for a previous conviction) into court to testify in a pending case. See generally *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 97 (1807) (Marshall, C.J.); 3 W. BLACKSTONE, COMMENTARIES *129-131. Appellants were brought to the District to testify in a case pending before the Superior Court.

³ For a brief discussion of the other issues, see note 68 *infra*.

consider whether evidence of threats, assaults, and conditions in the jail either negated the intent required to commit the crime of escape or provided a defense of duress, and whether the prosecution's evidence and the trial court's instructions were adequate on the issue of whether appellants were in the custody of the Attorney General by virtue of the convictions alleged in the indictment. We conclude that appellants are entitled to a new trial because the trial court did not properly instruct the jury as to what constitutes an "escape" and excluded relevant evidence from the jury's consideration. We also find that the trial court's instructions on the custody element were in some respects confusing and potentially misleading, but these problems will presumably be corrected in the new trial.

I

Appellants first contend that the trial judge erred in refusing to let the jury consider certain allegedly exculpatory evidence. The evidence in question sought to establish that there were frequent fires in the D.C. Jail where appellants were confined, set by both inmates and guards, and often allowed to burn while the inmates suffered from lack of proper ventilation,⁴ that appellants had been threatened with physical violence by guards,⁵ that appellants Bailey and Cooley had actually been beaten by guards,⁶ that appellant Walker had epilepsy and had

⁴ See, e.g., Tr. 150-152, 161-163, 168, 371, 377-378, 381, 390, 415, 547.

⁵ See, e.g., Tr. 154, 368-370, 389-394, 411, 469-473.

⁶ See, e.g., Tr. 368, 373-375, 404-405, 412, 475-478. Appellants Bailey and Walker were in the D.C. Jail pursuant to writs of *habeas corpus ad testificandum* so that they could testify in a criminal case in the Superior Court of the District of Columbia. Some of the alleged threats and abusive treatment were allegedly attempts by corrections officers to affect their testimony. As a result of this treatment appellant Bailey

received inadequate medical treatment for his condition,⁷ and that appellant Cooley had been forced by his co-appellants to leave the jail.⁸ Appellants argued in the District Court and assert again on appeal that this evidence was relevant either as negating the specific intent they claim is required as an element of the crime of escape or as establishing a defense of duress.

The trial court admitted this evidence during the trial, but effectively precluded the jury from considering it with regard to intent by holding that the crime of escape requires only general, rather than specific, intent.⁹ The court also refused to allow the jury to consider the de-

filed a suit in Superior Court against various guards, but the abusive treatment allegedly continued after the suit was filed. See, e.g., Tr. 529-533.

⁷ See, e.g., Tr. 438-458, 603-604, 625, 650-652, 678-680; appellant Walker's Exhibit 2-A.

⁸ See Tr. 404-405.

⁹ Tr. 773. See text at note 22 *infra*. Any doubt the jurors may have had as to the relevance of appellants' evidence to the issue of intent as defined by the trial court would have been resolved by the following instruction given by the court at the end of the case:

Now, ladies and gentlemen, the question has been raised during the course of this trial as to conditions at the District of Columbia Jail. I wish to say this to you with respect to that institution:

You are instructed as a matter of law that conditions at the District of Columbia Jail or the new detention center, no matter how burdensome or restrictive an individual inmate may find them to be, are not a defense to the charges in this case, nor justification for the commission of the offense of escape.

Tr. at 806. Furthermore, when the same judge later presided at the trial of a related case, he refused even to admit this type of evidence. See *United States v. Cogdell*, — F.2d —, — n.2 (D.C. Cir. No. 77-1602, decided July 12, 1978) (slip op. at 2-3 n.2).

fense of duress, holding that the duress defense is available only when the person asserting it turns himself in, and that this prerequisite was absent in appellants' cases as a matter of law.¹⁰

A. Intent

Our consideration of the relevance of the evidence in question to the elements of the crime of escape under 18 U.S.C. § 751(a) leads us to agree with the Seventh Circuit in *United States v. Nix*, 501 F.2d 516 (7th Cir. 1974), that a great deal of unnecessary confusion has been generated by the use of ill-defined terms and concepts such as "specific" and "general" intent.¹¹ Much of

¹⁰ See text and note at note 43 *infra*.

¹¹ See *United States v. Nix*, 501 F.2d 516, 518 (7th Cir. 1974); W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 201-202 (1972).

The dissent characterizes the court's opinion as a "bouleversement" that would create chaos in place of the alleged stability of traditional categories of criminal law—in large part because the court deals with the evidence at issue in this case under the rubric of "intent" as well as that of duress or necessity. The essential differences between the court and the dissent center around the proper roles of judge and jury, see note 28 *infra*, and are hardly so far-reaching as the dissent's rhetoric suggests. Furthermore, the dissent exaggerates the stability of the law with regard to the defenses of duress and necessity. The rigid restrictions on the availability of these defenses upon which the dissent relies have been rejected by several modern statutes, including the Model Penal Code, and by several courts in escape cases. See, e.g., *People v. Unger*, 66 Ill.2d 333, 362 N.E.2d 319 (1977); *People v. Luther*, 394 Mich. 619, 232 N.W.2d 184 (1975); *People v. Harmon*, 53 Mich.App. 482, 220 N.W.2d 212 (1974); AMERICAN LAW INSTITUTE, MODEL PENAL CODE §§ 2.09 (Duress), 3.02 (Justification Generally: Choice of Evils) (Proposed Official Draft 1962); Hawaii Rev. Laws § 249-5 (1955); Ill. Rev. Stat., ch. 38, § 7-13 (1975). See also text and notes at notes 29-52 *infra*. The dissent's accusation that the court is relying on "intent" because these other defenses are clearly unavailable on the facts of this case is thus without foundation.

this unhelpful complexity can be avoided by returning to basic principles—beginning with a clear definition of the crime of escape and proceeding to consider the proper roles of prosecution, defense, court, and jury in trying escape cases.

Consciously ignoring labels such as "specific" and "general" intent, the court in *Nix* concentrated on "what constitutes the 'escape' element of the crime." 501 F.2d at 518. Although "escape" is usually treated as a single element of the offense defined in Section 751(a), the word "escape"—like many other legal terms¹²—is not self-defining. A jury needs more instruction than this one word if it is properly to consider whether a defendant has "escaped." The Seventh Circuit found that "[m]ost courts, confronted with evidence that a defendant could not or did not form an intent to leave and not to return, have held such an intent essential to proof of the crime of escape." *Id.* (emphasis added).¹³ The court then con-

¹² For example, the legal term "rape" is defined as "[t]he unlawful carnal knowledge of a woman by a man forcibly and against her will." BLACK'S LAW DICTIONARY 1427 (4th ed. 1957). And the term "burglary" is defined as "[t]he breaking and entering the house of another in the nighttime, with intent to commit a felony therein, whether the felony be actually committed or not." *Id.* at 247.

¹³ *United States v. Nix*, *supra* note 11, 501 F.2d at 518-519, citing, *inter alia*, *United States v. Snow*, 484 F.2d 811 (D.C. Cir. 1973); *United States v. Chapman*, 455 F.2d 746 (5th Cir. 1972); *United States v. McPherson*, 436 F.2d 1066 (5th Cir.), cert. denied, 402 U.S. 997 (1971); *Chandler v. United States*, 378 F.2d 906 (9th Cir. 1967); *Gallegos v. People*, 159 Colo. 379, 411 P.2d 956 (1966); *People v. Dolatowski*, 94 Ill.App. 2d 434, 237 N.E.2d 553 (1968); *State v. Pace*, 192 N.C. 780, 136 S.E. 11 (1926); *State v. Hendrick*, 164 N.W.2d 57 (N.D. 1969); *State v. Lakin*, 131 Vt. 82, 300 A.2d 554 (1973). See also *Helton v. State*, 311 So.2d 381 (Fla.App. 1975); *Lewis v. State*, 318 So.2d 529 (Fla.App. 1975), cert. denied, 334 So.2d 608 (Fla. 1976). Cases representing the minority view include *People v. Siegel*, 198 Cal.App.2d 676, 18 Cal. Rptr. 268 (1961); *People v. Haskins*, 177 Cal.App.2d 84, 2 Cal. Rptr. 34 (1960);

cluded that this "close to unanimous" approach of the courts was justified by "the desire to have one human element of 'blameworthiness' as a basis for punishment"¹⁴ and because "a prisoner who has no intent to escape—because he is grossly intoxicated, or thinks his jailer has told him to leave, or mistakes the boundaries of his confinement, or has a gun held to his head by another inmate—is not likely to endanger society, as a wilful escapee is." *Id.* at 519.

On the basis of its review of precedents and policies, the Seventh Circuit defined "escape" for purposes of Section 751(a) as "a voluntary departure from custody with an intent to avoid confinement." *Id.* Following the Seventh Circuit's analysis, we conclude that an "escape" occurs when a defendant (1) leaves custody (2) voluntarily,¹⁵ (3) without permission,¹⁶ and (4) with an intent to avoid confinement.¹⁷

State v. Wharff, 257 Iowa 871, 134 N.W.2d 922 (1965). Describing the requisite intent for escape as an "intent to leave and not to return" is not completely satisfactory since it might not cover a prisoner who intends to take an unauthorized temporary leave of absence. The Seventh Circuit's own version of the intent requirement, "an intent to avoid confinement," 501 F.2d at 519, captures the sense of these cases while avoiding the leave of absence loophole. See text and note at note 17 *infra*.

¹⁴ *United States v. Nix*, *supra* note 11, 501 F.2d at 519, quoting Note, *Criminal Attempts—The Rise and Fall of an Abstraction*, 40 YALE L. J. 53, 69 (1930).

¹⁵ See, e.g., *United States v. Snow*, *supra* note 13.

¹⁶ This factor, though not explicitly stated in the *Nix* definition, was clearly implied. It is a generally recognized element of the definition of "escape" and was included in the trial court's definition in this case when the jury was instructed that appellants' departures must be "unauthorized." See Tr. 802.

¹⁷ The dissent fastens on the words "intent to avoid confinement" and would either reduce them to a statement of "general intent" indistinguishable from the "consciously and not

In order to convict a defendant of escape, the prosecution must prove each of these factors beyond a reasonable doubt. In the ordinary case the prosecution can establish a *prima facie* case that a defendant "escaped" by offering

inadvertently or by accident" instruction given by the trial court, or expand them to "intent to avoid confinement *permanently*." See dissent at 48-49 (emphasis in original). Neither of these extreme interpretations is appropriate. The word "confinement" describes the most common form of punishment prescribed by our legal system. Jurors are readily aware that a person serving a sentence for a crime is "confined"—i.e., his liberty is restricted—in certain fundamental ways. For example, he cannot leave the institution wherein he is confined, he cannot come and go as he pleases, his daily schedule is subject to various controls, his privacy is substantially curtailed, and he is subject to strict discipline. One who leaves custody without permission to see his mother who is ill or to improve his menu (assuming the prison fare is within reason) has an intent to avoid confinement since restricted contact with relatives and a reasonably limited choice of diet are normal incidents of confinement. Furthermore, a prisoner who leaves custody to take even a temporary "leave of absence" from the normal conditions of confinement possesses the requisite intent for escape. On the other hand, if a prisoner offers evidence to show that he left confinement *only* to avoid conditions that are not normal aspects of "confinement"—such as beating in reprisal for testimony in a trial, failure to provide *essential* medical care, or homosexual attacks—the intent element of the crime of escape may not be satisfied. When a defendant introduces evidence that he was subject to such "non-confinement" conditions, the crucial factual determination on the intent issue is thus whether the defendant left custody only to avoid these conditions or whether, in addition, the defendant *also* intended to avoid confinement. In making this determination the jury is to be guided by the trial court's instructions pointing out those factors that are most indicative of the presence or absence of an intent to avoid confinement. See text and notes at notes 20-21 *infra*.

Appellant Walker argues further that in order to violate § 751 a defendant must have the requisite intent *at the time he leaves custody*. Brief for appellant Walker at 40-43. He argues that § 751 should not be used to convict a prisoner

evidence that the defendant departed from custody without permission. Absent any additional evidence introduced by the defendant, such a case can be submitted to the jury with the instruction that the jury may infer the defendant's intent from the circumstances.¹⁸ The defense has the opportunity, however, to submit additional evidence tending to negate any essential aspect of the offense. For example, a jury can consider whether evidence of jail conditions, threats, and violence such as that presented by appellants in the District Court raises reasonable doubts concerning a defendant's capacity to act "voluntarily," or his intent to avoid confinement.¹⁹

who leaves with permission or without an intent to avoid confinement, noting that Congress has specifically provided a separate offense for one class of such prisoners—those on furlough who fail to return as prescribed. See 18 U.S.C. § 4082(c) (1976). Courts addressing this issue have not favored appellants' position. See, e.g., *United States v. Michelson*, 559 F.2d 567, 570-571 (9th Cir. 1977); *United States v. Spletzer*, 535 F.2d 950 (5th Cir. 1976); *United States v. Joiner*, 496 F.2d 1314 (5th Cir.), cert. denied, 419 U.S. 1002 (1974); *United States v. Woodring*, 464 F.2d 1248, 1250 (10th Cir. 1972); *United States v. Chapman*, supra note 13, 455 F.2d at 749; *Chandler v. United States*, supra note 13, 378 F.2d at 908. We are sympathetic with the concern expressed in these cases that a prisoner should not be allowed to remain at large with impunity simply because his initial departure did not under the circumstances constitute a crime. We therefore agree that the trial court should instruct the jury that a prisoner who lacks the intent to avoid confinement at the time he leaves custody may nevertheless commit the crime of escape if he later forms this intent and therefore fails to report to the authorities or to turn himself in. See also text and note at note 43 *infra*.

¹⁸ The jury must of course still apply the "beyond a reasonable doubt" standard to this inference. See *In re Winship*, 397 U.S. 358 (1970).

¹⁹ In order to be entitled to a special instruction on whether his intent to avoid confinement was negated by evidence of conditions in the jail, a defendant must, of course, introduce some evidence of these conditions. Since the evidence offered

The prosecution then has the opportunity to rebut the defense's evidence. The prosecutor can offer evidence of any circumstances or behavior inconsistent with the defendant's exculpatory contentions. Depending on that evidence, a prosecutor may argue that the conditions allegedly necessitating the defendant's departure from custody were relatively mild, that alternative remedies short of escape (e.g., resort to prison authorities or the courts) were available, or that the defendant failed to return voluntarily to custody once the conditions allegedly motivating the escape no longer threatened him. If the defendant takes the stand in his own defense, the prosecutor can inquire why he did not return voluntarily and can test the credibility of his defense by the rigors of cross-examination.

Finally, when instructing the jury on the elements of the offense charged, the judge should direct the jurors' attention to those considerations that require special emphasis. In addition to specifying the major indicia of voluntariness and intent—the immediacy, specificity, and severity of any alleged threats or fears, the availability of viable alternatives to unauthorized departure, and the defendant's decision whether and when to return to custody—the court should remind the jury of the inevitable difficulties associated with prison discipline²⁰ and of the possible biases of defense and prosecution witnesses tes-

by appellants in this case was clearly "substantial," we need not decide the minimum threshold of evidence necessary to entitle a defendant to this instruction. See generally *United States v. Nix*, supra note 11, 501 F.2d at 519-520; *United States v. Grimes*, 413 F.2d 1376 (7th Cir. 1969); *Womack v. United States*, 336 F.2d 959 (D.C. Cir. 1964); *Tatum v. United States*, 190 F.2d 612, 617 (D.C. Cir. 1950).

²⁰ Such an instruction should also indicate the general boundaries between what is and is not "confinement." See note 17 *supra*.

tifying with respect to that aspect of the case.²¹ It is the jury, however, that must make the final determination whether the prosecution has met its burden of proving each of the elements of the crime beyond a reasonable doubt. The court may not, as the District Court did in this case, take upon itself the responsibility for making this determination.

Our analysis of the law of escape indicates that the District Court erred in its definition of the offense and consequently precluded the jury's consideration of evidence that was relevant to an essential element of the crime. The trial judge instructed the jury that a defendant "escaped" if he "without authorization did absent himself from his place of confinement." Tr. 802. Relying on the opinion of the Tenth Circuit in *United States v. Woodring*, 464 F.2d 1248, 1251 (10th Cir. 1972), the trial judge told the jury that only a "general intent" was required to commit the crime of escape, and that this "means only that a defendant has the purpose to do something, the will to do the act. It means the act was done consciously and not inadvertently or accidentally." Tr. 803. *Woodring* is weak authority for the proposition that escape under 18 U.S.C. § 751 requires only "general" intent, since the court's entire "discussion" of the issue is limited to the following cryptic and conclusory reference:

The instruction on specific intent is not erroneous where willfulness is in the indictment. *Even though specific intent is not an element of § 751(a)*, specific intent became the law of the case when the Court

²¹ Cf. *United States v. Sheppard*, 569 F.2d 114, 118 (D.C. Cir. 1977) (in a rape case, "[w]here the motivation of the complainant in bringing the charge is an issue, as in a case where the defendant contends that she consented to the intercourse, the defense attorney is free to emphasize to the jury the dangers of falsification, and the judge should instruct the jury as to those dangers and the difficulty of establishing consent").

gave Instruction 11 ["specific intent must be proved before there can be a conviction"]. * * *

464 F.2d at 1251 (emphasis added).²² As indicated above, we find the Seventh Circuit's careful analysis in *United States v. Nix* much more persuasive authority.²³

²² The indictment in this case also alleged that appellants "did unlawfully and wilfully flee and escape" from custody. R. 32 (emphasis added).

²³ The dissent attempts to distinguish the *Nix* case by limiting that case to its facts and asserting that it holds only that intoxication may negate "general" as well as "specific" intent. Dissent at 42-44. This interpretation of the *Nix* opinion is untenable. Condemning the categorical rule that the relevance of such exculpatory factors as intoxication, coercion, and mistake depends on the mechanical and artificial classification of a crime as involving either specific or general intent, the Seventh Circuit rejected the specific/general intent terminology altogether and expressly refused to declare whether escape required "general" or "specific" intent. 501 F.2d at 518. Instead, the court followed a less categorical approach similar to that urged by some leading commentators, see W. LAFAVE & A. SCOTT, *supra* note 11, at 344: it focused on defining the intent element of the crime of escape and held (1) that a jury must be properly instructed as to this element, and (2) that if the defendant introduces adequate evidence of intoxication, the court should instruct the jury that it must consider whether the defendant was so intoxicated that he could not form the requisite intent. The *Nix* court did not limit its discussion to intoxication, but indicated its view that such factors as coercion and mistake could also negate the intent element of the crime of escape. See, e.g., 501 F.2d at 518 ("Whenever intoxication (or coercion or mistake) is raised as a mitigating factor, use of the 'specific' and 'general' intent labels interferes with the crucial analysis a court should make in escape cases: what constitutes the 'escape' element of the crime?"). We do no more than accept the *Nix* court's holding that "escape" includes an "intent to avoid confinement" and outline how a court and jury should consider evidence of extreme conditions, unrelated to normal confinement, that is relevant to the existence of that intent. The procedures we adopt closely parallel those adopted by the court in *Nix*. See *id.* at 519-520. While the dissent seems willing enough to accept the "modern

The District Court's attachment to a definition of "escape" that would effectively prevent the jury from considering the evidence of conditions in the jail, assaults, and threats in relation to appellants' intent reflects a line of cases in which courts, moved by fears of undermining prison discipline or encouraging mass escapes, have hesitated to allow juries even to consider such allegedly exculpatory evidence in escape cases unless various rigorous conditions have been satisfied.²⁴ We find no adequate justification for this special broad proscription against admission of such probative defense evidence relating to intent. Juries are accustomed to determining the intent of alleged criminals, and we see nothing in the context of prosecutions for escape that requires the court to risk denying the defendants a fair trial by denying the jury its normal function. Those escape cases in which juries have been allowed to consider exculpatory evidence

and ascendant view" with respect to *intoxication* in order to "distinguish" *Nix*, it is apparently unwilling to apply the basic principle underlying that "modern and ascendant view" to the facts of this case. Instead the dissent prefers to adhere to the mechanical specific/general intent terminology specifically rejected in *Nix* and to rely on such weak authority as the *Woodring* case, *see* text and note at note 22 *supra*, for the proposition that escape is a general intent crime. *See* dissent at 42 & n.84.

²⁴ Some of the older cases would exclude such evidence altogether. *See, e.g., People v. Whipple*, 279 P. 1008 (Cal. App. 1929). Other cases have treated such evidence as relevant to duress or necessity defenses and have imposed rigid limits on the availability of these defenses. *See, e.g., People v. Lovercamp*, 43 Cal.App.3d 823, 118 Cal.Rptr. 110 (1974); *State v. Green*, 470 S.W.2d 565 (Mo. 1971), *cert. denied*, 405 U.S. 1073 (1972); *Grubb v. State*, 533 P.2d 988 (Okla. Crim. App. 1975); *State v. Worley*, 265 S.C. 551, 220 S.E.2d 242 (1975). *See generally* Annot., *Duress, Necessity, or Conditions of Confinement as Justification for Escape from Prison*, 69 A.L.R.3d 678 (1976). Courts adopting a more flexible approach include: *People v. Unger*, *supra* note 11; *People v. Luther*, *supra* note 11; *People v. Harmon*, *supra* note 11.

offer no support for fears that jurors are unable reasonably to consider all the aspects of escape cases or that juries will render decisions that will "encourage" escapes.²⁵ In fact, the assumptions underlying the special restrictions on defense evidence in escape cases appear to be pure speculations without any empirical support in either the case law or the scholarly literature. On the other hand, the pernicious consequences of the restrictive rules are all too clear from the reported cases.²⁶ As we have explained above, the proper approach is to inform the jury of those considerations that are relevant to its deliberations, not to take the issue out of its hands.²⁷ In our view allowing the jury to perform its accustomed role in escape cases may make those responsible for prison conditions more conscious of their responsibilities and may well lead to fewer, rather than more, escapes. *See People v. Harmon*, 53 Mich.App. 482, 220 N.W.2d 212 (1974), *aff'd*, 394 Mich. 625, 232 N.W.2d 187 (1975).²⁸

²⁵ *See, e.g., United States v. Grayson*, 550 F.2d 103 (3d Cir. 1977), *cert. granted*, — U.S. —, 46 U.S. L. WEEK 3214 (Oct. 4, 1977); *United States v. Chuck*, 542 F.2d 728 (8th Cir.), *cert. denied*, 429 U.S. 986 (1976); *Syck v. State*, 130 Ga.App. 50, 202 S.E.2d 464 (1973).

²⁶ *See, e.g., State v. Green*, *supra* note 24, 470 S.W.2d at 568 (Seiler, J., dissenting); *People v. Whipple*, *supra* note 24.

²⁷ *See People v. Unger*, *supra* note 11, 66 Ill.2d at —, 362 N.E.2d at 323. This court recently affirmed its confidence in the role of the jury as fact-finder in criminal cases in *United States v. Sheppard*, *supra* note 21. *Sheppard* discontinued the corroboration requirement in rape cases, relying on the adversary process and proper judicial instructions to guide the jury in reaching a just result. *See* note 21 *supra*.

²⁸ Despite the length of the dissent, its basic differences from the opinion of the court can be stated briefly. The fundamental *theoretical* difference is that the dissent refuses to accept the holding of the *Nix* court that an "escape" requires an "intent to avoid confinement." *See* note 17 and text and notes at notes 11-14 *supra*. The dissent's motive for rejecting the *Nix* holding is related to the basic *practical* differences

See also *United States v. United States Gypsum Co.*, — U.S. —, —, —, 46 U.S. L. WEEK 4937, 4941-4944 (June 29, 1978).

B. Duress-Necessity-Compulsion-Choice of Evils

In addition to giving an instruction that made the evidence of conditions in the jail, assaults, and threats irrelevant to the intent issue, the trial judge refused to let the jury consider the evidence as grounds for a defense of "duress." There is some theoretical confusion over the nature of the defenses of duress and necessity, especially in the context of prison escape cases.²⁹ This confusion can

between the two opinions: While the court and the dissent basically agree on what issues are relevant to weighing evidence of prison conditions in escape cases—*e.g.*, the severity of conditions, the availability of alternatives to escape, the promptness and voluntariness of return to custody—the dissent would hold all such evidence irrelevant as a matter of law unless it is determined that *every one* of five specific prerequisites related to these issues is met. The court, on the other hand, holds that, at least when a defendant, as in this case, introduces substantial evidence of extreme conditions, the jury is not absolutely prohibited from considering such evidence merely because certain inflexible prerequisites are not satisfied. In the court's view, the factors represented by the prerequisites are the most significant considerations, but none of the prerequisites by itself is necessarily determinative. Once the defendant has presented a threshold amount of evidence, that evidence is to be considered by a properly instructed jury. See *People v. Unger*, *supra* note 11, 362 N.E.2d at 323 (quoted in note 37 *infra*).

²⁹ Most of the arguments and evidence presented by appellants do not fit within the standard definition of a "duress" or "necessity" defense. The duress defense normally requires a defendant to establish that he engaged in criminal conduct only because he was compelled to do so by another person's unlawful threat which caused him reasonably to believe that he must commit the crime to avoid imminent death or serious bodily harm to himself or a third person. See W. LAFAVE & A. SCOTT, *supra* note 11, at 374-381. Only appellant Cooley's claim that Walker and Bailey forced him to leave the jail fits this classic model comfortably. The standard necessity de-

be minimized, however, by concentrating on the basic principles underlying a proffered defense and avoiding unhelpful labels such as "duress" and "necessity."

The defenses usually raised under the duress/necessity labels reflect two different general principles of exculpation. One of these principles, exemplified by the notion of duress as compulsion, dictates that a person will not be held responsible for an offense he commits under threats or conditions that a person of ordinary firmness would have been unable to resist.³⁰ This principle, like the defenses of intoxication, insanity, and mistake, negates the intent or voluntariness elements of an offense.³¹ In-

fense is available when "[t]he pressure of natural physical forces * * * confronts a person in an emergency with a choice of two evils" and when choosing the lesser of the two evils requires the person to violate the criminal law. *Id.* at 381, 382-388. Since appellants' evidence involves human threats and forces, rather than natural physical ones, it does not establish a classic necessity defense. Courts and commentators have recognized the difficulties created, particularly in prison escape cases, by exculpatory evidence falling in between the traditional duress and necessity defenses and have proposed various solutions. See, *e.g.*, *United States v. Michelson*, *supra* note 17; *People v. Lovercamp*, *supra* note 24; *People v. Unger*, *supra* note 11; *People v. Luther*, *supra* note 11; *People v. Harmon*, *supra* note 11; Gardner, *The Defense of Necessity and the Right to Escape from Prison*, 49 SO. CAL. L. REV. 110 (1975); Comment, *Escape: The Defense of Duress and Necessity*, 6 SAN FRAN. L. REV. 430 (1972); Note, *Duress and the Prison Escape: A New Use for an Old Defense*, 45 SO. CAL. L. REV. 1062 (1972); Casenote, *People v. Harmon*, 220 N.W.2d 212 (Mich. App. 1974), 43 U. CIN. L. REV. 956 (1974); Annot., *supra* note 24.

³⁰ See Model Penal Code § 2.09 (Proposed Official Draft 1962) and Commentary on § 2.09 (Tent. Draft No. 10 1960).

³¹ The Model Penal Code includes the defense based on this principle, along with the defenses of intoxication and mistake, in Article 2: General Principles of Liability. The Model Penal Code defense based on the choice of evils principle, on

structions with respect to this type of defense for the crime of escape are discussed above under "Intent" (I-A *supra*) and require no further consideration here.³²

the other hand, is included in Article 3: General Principles of Justification.

The dissent claims that every version of the duress defense must also satisfy the principle of "social utility" embodied in the "choice of evils" defense. Dissent at note 92. However, if, as the dissent suggests, duress can be a defense only where the harm to be avoided by committing an offense outweighs the harm caused by committing the offense, then any separate provision for a duress defense in a code that already contains a general choice-of-evils-type defense would be mere surplusage. Yet, as indicated above, the Model Penal Code contains *both* a general choice of evils defense and a duress defense.

³² Appellants requested the following instruction on "duress":

A defendant is not criminally responsible for the commission of the crime of willingly and voluntarily escaping from jail if he committed the act of escaping from incarceration as a result of coercion exerted on him.

Coercion which would excuse the commission of a criminal act must result from:

- 1) Threatening [*sic*] conduct sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;
- 2) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;
- 3) The fear or duress was operating upon the mind of the defendant at the time of the alleged act; and
- 4) The defendant committed the act to avoid the threatened [*sic*] harm.

When evidence of coercion or duress is present, the Government must prove beyond a reasonable doubt that the defendant did not act under coercion. In other words, if you have a reasonable doubt whether or not the defendant acted under coercion as the court has defined it to you, your verdict must be not guilty.

R. 32A. This instruction might be interpreted as raising only the type of defense that would be covered under the instructions on intent set out above. On the other hand, given the theoretical confusion over the labels of duress and necessity

The other general principle reflected in the discussions of duress/necessity defenses is one of justification by choice of the lesser evil—*i.e.*, that a person is not guilty of an offense if he committed it because he reasonably believed his action was necessary to avoid a harm more serious than that sought to be prevented by the statute defining the offense.³³ Rather than excusing a defendant's action because he lacked the intent society wishes to punish, this "choice of evils" defense affirmatively justifies the defendant's action: the defendant did the *right* thing, because "public policy favors the commission of a lesser harm (the commission of what would otherwise be a crime) when this would avoid a greater harm."³⁴ Courts and legislatures that have recognized this type of defense have often reflected the theoretical confusion surrounding the duress/necessity labels more than the fundamental choice of evils principle by creating "fixed rules which depart somewhat from the rationale underlying the [general] rule."³⁵ The tendency of courts to structure duress/necessity defenses in terms of such fixed rules has been particularly pronounced in escape cases.³⁶ The more

and the principles underlying these defenses, appellants' proposed instruction might also be construed to raise a choice of evils defense. We therefore consider that type of defense as well.

³³ See, *e.g.*, Ill. Rev. Stat., ch. 38, § 7-13 (1975); Model Penal Code § 3.02 (Proposed Official Draft 1962) and Commentary on § 3.02 at 5 (Tent. Draft No. 8 1958); W. LAFAVE & A. SCOTT, *supra* note 11, at 378-379, 381-383. Even statements of the general principle vary in such aspects as the degree of objectivity required. The Model Penal Code, for example, requires that the balance of harms *in fact* favor commission of the crime, regardless of the defendant's reasonable belief.

³⁴ W. LAFAVE & A. SCOTT, *supra* note 11, at 378.

³⁵ *Id.*

³⁶ See, *e.g.*, cases cited in note 24 *supra*.

progressive codes and cases, however, have tended to reduce the theoretical and practical complexities of the choice of evils defense to a few general guidelines consistent with its basic rationale.³⁷

³⁷ The Model Penal Code provision reads:

Section 3:02. Justification Generally: Choice of Evils.

(1) Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:

(a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and

(b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and

(c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

(2) When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this Section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

Model Penal Code § 3.02 (Proposed Official Draft 1962). The Illinois Code section relied on by the court in *People v. Unger*, *supra* note 11, provides:

Conduct which would otherwise be an offense is justifiable by reason of necessity if the accused was without blame in occasioning or developing the situation and reasonably believed such conduct was necessary to avoid a public or private injury greater than the injury which might reasonably result from his own conduct.

Ill. Rev. Stat., ch. 38, § 7-13 (1975). The *Unger* court rejected an attempt to impose the rigid *Lovercamp* conditions in prison escape cases with the following comment:

We agree with the State and with the court in *Lovercamp* that the above conditions are relevant factors to be used

In regard to the choice-of-evils-type defense, this particular case in its present posture at most³⁸ presents the relatively narrow question whether a jury should be allowed to consider an otherwise sufficiently supported³⁹ choice of evils defense in the absence of *one* of the special prerequisites some courts have imposed upon such defenses in escape cases—the requirement that an escapee turn himself in to the authorities immediately after

in assessing claims of necessity. We cannot say, however, that the existence of each condition is, as a matter of law, necessary to establish a meritorious necessity defense.

The preconditions set forth in *Lovercamp* are, in our view, matters which go to the weight and credibility of the defendant's testimony. The rule is well settled that a court will not weigh the evidence*where the question is whether an instruction is justified. * * * The absence of one or more of the elements listed in *Lovercamp* would not necessarily mandate a finding that the defendant could not assert the defense of necessity.

362 N.E.2d at 323. See also *People v. Luther*, *supra* note 11; *People v. Harmon*, *supra* note 11.

³⁸ See note 32 *supra*.

³⁹ The dissent claims that appellants failed as a matter of law not only to satisfy the return requirement, but also to present sufficient evidence of the harm to be avoided to get to the jury. Dissent at 26-28. The dissent's view on this point contradicts the opinion of the trial court, which was willing to submit a "duress" instruction except for appellants' failure to meet the return requirement. See note 43 *infra*. In our view the trial court's conclusion that the evidence on this point was sufficient to submit to the jury was clearly correct. The dissent's narrow insistence on threats of "immediate" harm as an absolute prerequisite for the choice of evils defense seems particularly inappropriate in escape cases, where a possibility for escape (especially nonviolent escape) is not likely to remain available until a substantial threat becomes "immediate" in the narrow sense urged by the dissent.

escaping.⁴⁰ After considering appellants' proposed "duress" instruction⁴¹ and a memorandum on duress/necessity defenses in escape cases submitted by the Government,⁴² the trial court announced that it had prepared an instruction on duress, but at the last moment decided that it could not give the instruction because, "[a]s the Court heard the evidence," the defendants had not turned themselves in or made adequate efforts to do so. Tr. 806-807.⁴³

⁴⁰ The "return requirement" has been described in various ways. In this case the trial court refused to allow appellants' duress instruction because "[t]he defendants did not turn themselves in." Tr. 807. Elsewhere in the proceedings the trial court suggested that "[h]ad these men notified the authorities or the public defender in an effort to surrender under conditions that might have been arranged by the public defender, then I would have permitted the duress and condition argument." Tr. 778. *People v. Lovercamp*, *supra* note 24, establishes the return requirement in the following terms:

[A] limited defense of necessity is available if the following conditions exist: * * *

* * * * *

(5) The prisoner immediately reports to the proper authorities when he has attained a position of safety from the immediate threat.

118 Cal.Rptr. at 115.

⁴¹ See note 32 *supra* for text of appellants' proposed instruction.

⁴² R. 35.

⁴³ The trial court expressly stated that if appellants had satisfied the return requirement, "I would have permitted the duress and condition argument. In fact, I have here an instruction, which I drew up very carefully with that in mind, but I realized that at the end of which I was calling upon the jury to make a finding that they couldn't make, that is to say that these men had turned themselves in and that is a prerequisite to the assertion of the defense of duress, or coercion." Tr. 778-779. Since the court's instruction would

The most influential statement of the "return requirement" as a prerequisite to a choice-of-evils-type defense in escape cases is contained in the opinion of an intermediate California appellate court in *People v. Lovercamp*, 43 Cal.App.3d 832, 118 Cal.Rptr. 110 (1974).⁴⁴ The *Lovercamp* court apparently imposed the requirement because it feared that without it a prisoner who satisfied the other conditions of the defense could "thereafter go his merry way relieved of any responsibility for his unseemly departure." 118 Cal.Rptr. at 115. Subsequent opinions, most notably the Ninth Circuit's discussion in *United States v. Michelson*, 559 F.2d 567 (9th Cir. 1977),⁴⁵ have developed this rudimentary rationale more rigorously. The *Michelson* court's analysis reveals that the return requirement is based on the critical assumption that escape is a "continuing" offense, *i.e.*, that one may commit the crime of escape, even if his original departure from custody was justified, by failing or refusing to *return* to custody once the justifying circumstance is no longer present. Thus the Ninth Circuit found it unnecessary to decide "whether defendant acted out of duress in escaping" because the defendant in *Michelson* had been absent from custody for nearly two years and his duress defense applied only to his initial depar-

have been given but for the return requirement, the choice of evils issue in this case turns on the validity of that requirement.

⁴⁴ The *Lovercamp* court's version of the return requirement is quoted in note 40 *supra*. Since the prisoners in *Lovercamp* had been apprehended almost immediately after their departure, the appeals court remanded the case for a determination of whether appellants *intended* to surrender to the authorities.

⁴⁵ See also *Stewart v. United States*, 370 A.2d 1374 (D.C. Ct. App. 1977).

ture, not to the two years he was at large.⁴⁶ 559 F.2d at 571. In support of its conclusion the *Michelson* court cited with approval *United States v. Chapman*, 455 F.2d 746 (5th Cir. 1972), where "[t]he jury was instructed that even if they should find that the defendant was initially forced by other prisoners to leave federal custody, 'if he thereafter on his own volition decided to remain at large this would constitute the crime of escape.'" 559 F.2d at 570-71, quoting *United States v. Chapman*, *supra*, 455 F.2d at 749 (emphasis added). Under the analysis in these cases, the return requirement merely stands for the limited and commonsense notion that a choice of evils defense to the crime of "escape"—defined as leaving *and staying away from* custody—lasts only as long as the choice of evils justifies a failure to return.

The Ninth Circuit's analysis indicates that the trial court's application of the return requirement in the circumstances of this case was inappropriate.⁴⁷ Even if we accept the notion on which the requirement is based—that escape is a continuing offense—this theory was not reflected in the indictment or in the trial court's charge to the jury. Although we would be very sympathetic to a jury instruction similar to that in *Chapman* to the effect that a defendant can "escape" by failing to return to

⁴⁶ The prisoner in *Michelson* allegedly feared that if he remained in prison he would be harmed by another inmate who had already injured him in a violent fight. 559 F.2d at 568.

⁴⁷ *Michelson* is also distinguishable from this case on the intent issue. The defense in that case did not raise the issue, and the court's comments on the circumstances of the case indicate the reason for this: "The F.B.I. agent who arrested Michelson testified that Michelson, having been advised of his rights, freely admitted escaping * * * [and] also told the agent that his escape had been prompted not only by his beating by Santini, but also by the lengthy twenty-two year sentence imposed for the bank robbery and the Parole Board's refusal to set a release date for him." 559 F.2d at 568.

custody even if his initial departure was justified and that a choice of evils defense to escape must therefore justify not only a defendant's original departure but also his continued absence,⁴⁸ no such instruction was given in this case. Instead, appellants were indicted for "flee[ing] and escap[ing]" "[o]n or about August 26, 1976,"⁴⁹ and the trial court's instructions, rather than explaining a "continuing offense" concept to the jury, emphasized the notion that the offense took place when appellants left the jail on August 26.⁵⁰ Thus this is not a case where the jury was considering whether a defendant had escaped by failing to return. Appellants were tried and convicted of escaping by leaving the jail on August 26, and it was therefore error for the trial court to deny a choice of evils instruction on the ground that the defendants had not returned or adequately explained their continued absence. In effect, the trial court denied appellants' right to have the jury consider a duress defense to the crime with which they had been charged (escaping on August 26) because the court found that they would in any event be guilty of an offense *under a theory (failure to return) that was never presented either to appel-*

⁴⁸ We recognize the pressures that have led courts to construe escape as a continuing offense. See note 17 *supra*. Nevertheless, there is some force to appellants' argument that this interpretation is not clear on the face of the statute, and the rule favoring strict construction of criminal statutes makes it important that the continuing offense concept be clearly explained to the jury.

⁴⁹ R. 32.

⁵⁰ For example, the trial court instructed the jury to consider whether the defendants had been convicted of a felony "at the time of the offense charged in the indictment, that is to say August 26th, 1976 * * *." Tr. 801. The trial court's instructions when read as a whole clearly give the impression that appellants were being tried only for leaving the jail on August 26, and not for failing to return at some later date.

lants or to the jury. We cannot sanction such an obvious violation of appellants' constitutional right to jury trial.

Under the circumstances of this case it is unnecessary for us to consider exhaustively the proper prerequisites to a choice of evils defense in escape cases.⁵¹ The trial court apparently gave this question considerable attention, and we do not know the nature of its prepared instruction except that were it not for the return requirement, which must be modified in accordance with our opinion,⁵² it was willing to have the jury consider the defense.⁵³

⁵¹ See *United States v. Michelson*, *supra* note 17, 559 F.2d at 571 n.10.

⁵² An acceptable version of the "return requirement" would include (1) an instruction that escape is a continuing offense, and (2) an instruction that a choice of evils defense cannot justify continued absence if the conditions establishing the defense (whatever the court determines them to be) do not continue for the period a prisoner remains at large.

⁵³ The dissent argues that the court "labor[s] mightily to exculpate these defendants." Dissent at 51. This statement wholly misconceives the issues in the court's opinion. We do not even decide whether the conditions alleged by appellants actually existed, much less whether they justified appellants' actions. Our concern is rather to clarify the law as to the relevance of appellants' evidence and to assure that the jury is not denied the opportunity to perform its accustomed and constitutionally mandated functions. Indeed, it is the *dissent* that "labors mightily" to usurp the jury's proper function when, for example, it rehearses its view of the evidence at length with the thinly veiled purpose of suggesting which witnesses are credible and which are not, dissent at 2-7, and when it complains that requiring the jury (and the defendants) to be adequately informed of the nature of the crime for which they are trying a defendant is "patently frivolous." Dissent at 25.

C. Summary

We find prejudicial error in the District Court's instruction on the element of "escape," which prevented the jury from properly considering evidence relevant to appellants' intent. The District Court also erred by imposing a return requirement as an absolute prerequisite to appellants' proposed "duress" instruction, rather than instructing the jury that escape is a continuing offense and that such a defense must therefore justify a defendant's continued absence as well as his initial departure. Appellants' convictions must therefore be reversed and their cases remanded for a new trial.

II

Appellants also challenge the trial court's instructions and the sufficiency of the evidence with regard to another element of the offense: whether at the time they escaped they were *in the custody of the Attorney General by virtue of the convictions alleged in the indictment*.⁵⁴ The indictment charged that all three appellants had been lawfully committed to the custody of the Attorney General by virtue of specific federal convictions and sentences and had escaped from such custody.⁵⁵ The prosecu-

⁵⁴ The reason for a defendant's confinement is important because of the penalty provisions of § 751(a), which vary the severity of the penalties depending on whether a defendant was in custody "by virtue of an arrest on a charge of felony, or conviction of any offense," or "for extradition or by virtue of an arrest or charge of or for a misdemeanor, and prior to conviction * * *." 18 U.S.C. § 751(a) (for full text *see* note 1 *supra*).

⁵⁵ The charge against appellant Bailey is illustrative:

On or about August 26, 1976, within the District of Columbia, CLIFFORD BAILEY, having been lawfully committed to the custody of the Attorney General on March 6, 1973 and April 18, 1973, by virtue of a con-

tion's evidence indicated that Cooley was serving a sentence in the D.C. Jail, while Bailey and Walker, who were serving sentences in the federal facility in Leavenworth, Kansas, had been brought to the D.C. Jail pursuant to writs of *habeas corpus ad testificandum* issued by the Superior Court for the District of Columbia.

Appellants raise two objections to the instructions and the evidence on the custody element of the offense. First, appellant Cooley argues that the prosecution's evidence that he was in custody by virtue of his federal conviction at the time he escaped was insufficient as a matter of law. The prosecution relied primarily on documentary evidence to prove the custody element in all three cases.⁵⁶ In Cooley's case, for example, the Government introduced (1) a "face sheet" showing that Cooley was committed to the "D.C. Jail" on April 10, 1976 as a "federal prisoner" (Government Exhibit No. 8), (2) a Judgment and Commitment Order dated May 20, 1976 showing that following his conviction of Possession of an Unregistered Firearm, 26 U.S.C. § 5861(d) (1970), Cooley was sentenced and "committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years" (Government Exhibit No. 2), (3) an Escape and Apprehension Form dated August 26, 1976 noting that Cooley had escaped

viction and sentence imposed by the United States District Court for the District of Maryland in Criminal Case Numbers 72-0599 and 73-077, respectively, did unlawfully and wilfully flee and escape from such custody.

(Violation of Title 18, U.S. Code, Section 751(a))

R. 32.

⁵⁶ Appellants Bailey and Walker adopt appellant Cooley's argument with respect to their own cases. Although the documentary evidence varied slightly among the three cases, the analysis of Cooley's argument applies with equal force to the other two cases.

from the D.C. Jail on that date (Government Exhibit No. 5), and (4) the testimony of the Supervisor of Records at the D.C. Jail that there was no record of Cooley's being released from the jail's custody before August 26. Tr. at 27-28.

Since there was no specific documentary evidence, such as a return on the Judgment and Commitment Order, showing that the Attorney General committed him to the new D.C. Jail, Cooley argues that the evidence fails to prove that he was confined in the jail by virtue of the conviction alleged in the indictment. He draws support from *Strickland v. United States*, 339 F.2d 866 (10th Cir. 1965), a case in which the Tenth Circuit reversed a jury conviction under Section 751(a) because it held that evidence similar to that introduced here was insufficient as a matter of law to establish a *prima facie* case. Although the Government's proof of a "chain of custody" pursuant to the convictions alleged in the indictment is not as strong as it could be, we do not agree that the prosecution's evidence fails to establish a *prima facie* case as a matter of law.⁵⁷ Reasonable inferences based on the evidence presented could enable a jury to find beyond a reasonable doubt that appellant Cooley was in custody by virtue of the convictions alleged in the indictment at the time he left confinement. Moreover, the trial court's in-

⁵⁷ The court in *Strickland v. United States*, 339 F.2d 866 (10th Cir. 1965), relied on *Mullican v. United States*, 252 F.2d 398 (5th Cir. 1958), a case in which certain documentary evidence linking a defendant's custody when he escaped to the conviction alleged in his indictment was held inadmissible. Although the *Mullican* court found that the admission of the evidence had been prejudicial error, it did not dismiss the case (as the *Strickland* court did), but remanded for a new trial in which the jury would be allowed to decide the custody issue without the inadmissible evidence. 252 F.2d at 405.

structions with respect to Cooley's custody were essentially correct.⁵⁸

The second objection related to the custody element of the offense concerns only the appellants who were brought to the D.C. Jail pursuant to writs of *habeas corpus ad testificandum*—Bailey and Walker. The trial court instructed the jury:

Prisoners, such as two of the prisoners in this case, defendants in this case who are convicted in another jurisdiction and who were in the custody of the Attorney General, were brought to this jurisdiction as the documentary evidence shows, because they were summonsed [*sic*] as witnesses by another defendant in a proceeding then pending in the District of Columbia court. They are still under the custody today of the Attorney General regardless of how they happened to be brought into the District of Columbia Jail.

Tr. at 800-801. Appellants claim that this instruction does not state the law and that it effectively removes an issue of fact from the jury's consideration.

⁵⁸ The trial court instructed the jury that in order to convict it must find beyond a reasonable doubt (1) that each appellant had been convicted of a felony, and (2) that "as a result of the conviction [each appellant] was committed to the custody of the Attorney General or [his] designated representative, and was in custody at the time of the offense." Tr. 801-802. These instructions raise no problem, and we think it unlikely that the jury was confused by the court's earlier statement that "with respect to each of the defendants who is on trial in this case the Court instructs you that defendants convicted either in this federal court or in the Superior Court of felonies, or in the federal court[s] throughout the country are committed to the custody of the Attorney General of the United States. This is a general practice and the Court will take judicial notice of it and instruct you accordingly." Tr. 800.

Appellants' basic argument is that when a prisoner who has been committed to the custody of the Attorney General is transferred pursuant to a writ of *habeas corpus ad testificandum*, the prisoner is no longer in the custody of the Attorney General pursuant to the original commitment, but is in the custody of the court that issued the writ—at least during the operation of the writ. Appellants therefore urge that, contrary to the instructions given by the trial court, there was a factual question whether they were in the custody of the Attorney General or of the Superior Court at the time they left the jail, and they claim further that the Government's evidence on this factual issue was insufficient to establish a *prima facie* case.

Appellants claim to find authority for their position in the early Supreme Court opinion in *Barth v. Clise*, 79 U.S. (12 Wall.) 400 (1870). That case was a suit against a sheriff to recover a debt owed to the plaintiff by a prisoner who had escaped while the sheriff was allegedly responsible for his safekeeping. The sheriff, who had arrested the prisoner pursuant to a writ of *ne exeat* obtained by the plaintiff, had brought the prisoner into court pursuant to a writ of *habeas corpus* obtained by the prisoner. The prisoner then escaped from the courtroom during the *habeas corpus* proceeding and fled to Canada. The Supreme Court held that the sheriff was not liable for the debt owed by the prisoner, explaining that once the sheriff had returned the prisoner to the court pursuant to the writ of *habeas corpus*, the responsibility for the safekeeping of the prisoner passed to the court "until the case is finally disposed of." 79 U.S. (12 Wall.) at 402.

Citing broad language in *Barth*,⁵⁹ appellants argue that

⁵⁹ By the common law, upon the return of a writ of *habeas corpus* and the production of the body of the party suing it out, the authority under which the original commitment

unless the testimony for which they had been brought to the District of Columbia had been completed, they were in custody pursuant to an order of the Superior Court and not by virtue of their federal convictions at the time they left the jail.⁶⁰ Similar arguments based on *Barth v. Clise* have been raised in several previous escape cases brought under Section 751(a), but such arguments have never persuaded any court to find the requisite custody lacking in the case before it.⁶¹

Like these other cases, the case before us is distinguishable from *Barth* on several grounds. *Barth* dealt with the common law liability of a custodian for the escape of a prisoner, while this case involves an interpretation of the terms of the federal escape statute. The prisoner in *Barth* escaped from the courtroom during the *habeas* proceeding, while appellants allegedly left an institution designated by the Attorney General for confinement of federal prisoners. Finally, *Barth* involved a writ of

took place is superseded. After that time, and until the case is finally disposed of, the safe-keeping of the prisoner is entirely under the control and direction of the court to which the return is made. The prisoner is detained, not under the original commitment, but under the authority of the writ of *habeas corpus*. Pending the hearing he may be bailed *de die in diem*, or be remanded to the jail whence he came, or be committed to any other suitable place of confinement under the control of the court. * * *

Barth v. Clise, 79 U.S. (12 Wall.) 400, 402 (1879).

⁶⁰ The prosecution introduced no evidence at the trial as to whether appellants had completed their testimony in the Superior Court. Appellants Walker and Bailey therefore argue that their cases must be dismissed.

⁶¹ See, e.g., *United States v. Viger*, 530 F.2d 846 (9th Cir. 1976); *United States v. Stead*, 528 F.2d 257 (8th Cir. 1975), cert. denied, 425 U.S. 953 (1976); *Tucker v. United States*, 251 F.2d 794 (9th Cir. 1958).

habeas corpus ad subjiciendum (the Great Writ), while the case before us concerns a writ of *habeas corpus ad testificandum*.

In light of these distinctions, we find that *Barth* does not prevent us from deciding that a prisoner who has been committed to the custody of the Attorney General by virtue of a conviction is still in the custody of the Attorney General by virtue of that conviction for the purposes of Section 751(a) when he is transferred pursuant to a writ of *habeas corpus ad testificandum* and confined in an institution designated by the Attorney General for the custody of federal prisoners. Policy considerations support at least this broad an interpretation of Section 751. The jurisdiction from which a prisoner is brought pursuant to a writ of *habeas corpus* has a significant interest in preventing the prisoner's escape from custody. This interest has been recognized in an analogous situation by the drafters of the Interstate Agreement on Detainers (IAD), who provided that when a prisoner serving a sentence in one jurisdiction is brought to another jurisdiction for trial on another offense and escapes while in the receiving jurisdiction, he may be prosecuted under the escape statute of the sending jurisdiction.⁶²

In addition to protecting the interest of the sending jurisdiction, holding that prisoners transferred by writs

⁶² (g) For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending State and any escape from temporary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

Interstate Agreement on Detainers, Article V(g), 18 U.S.C. App. (1976).

of *habeas corpus ad testificandum* are still in custody "by virtue of" the original commitment makes intuitive sense. The writ of *habeas corpus ad testificandum* is necessary only because the prisoner is already in custody elsewhere; the prisoner is kept confined when he is not testifying essentially because of the previous commitment; and any time during which the prisoner is confined under the writ counts toward satisfying the prisoner's original sentence. Courts interpreting the term "custody" in escape cases⁶³ and cases involving writs of *habeas corpus*⁶⁴ have demonstrated a flexibility responsive to such considerations of policy and common sense. Indeed, at least two other judicial decisions have in effect come to the same conclusion we reach.⁶⁵

Although the trial judge's instructions matched the general sense of our holding, we recognize that some portions of the instructions on this matter were confusing and might have invaded the province of the jury.⁶⁶ We assume, however, that any such deficiencies in the instructions will be cured on remand.

⁶³ See, e.g., *United States v. Rudinsky*, 439 F.2d 1074 (6th Cir. 1971) (prisoner on work release); *Chandler v. United States*, *supra* note 13, 378 F.2d at 908; *Read v. United States*, 361 F.2d 830 (10th Cir. 1966) (prisoner at recreation away from institution); *Frazier v. United States*, 339 F.2d 745 (D.C. Cir. 1964) (prisoner in hospital outside institution).

⁶⁴ See, e.g., *Hensley v. Municipal Court*, 411 U.S. 345 (1973); *Peyton v. Rowe*, 391 U.S. 54 (1968); *Jones v. Cunningham*, 371 U.S. 236 (1963).

⁶⁵ *United States v. Viger*, *supra* note 61; *Tucker v. United States*, *supra* note 61. See also *United States v. Hall*, 451 F.2d 347 (4th Cir. 1971).

⁶⁶ An example is the court's instruction that prisoners such as appellants Bailey and Walker "are still under the custody today of the Attorney General regardless of how they happened to be brought into the District of Columbia Jail." Tr. 800-801.

III

Appellants also raise other issues,⁶⁷ but in light of our decision to grant a new trial on the ground of the erroneous instructions on "escape" we find it unnecessary to discuss these other questions.⁶⁸ These cases are accord-

⁶⁷ Despite its length, the dissent addresses only one of the issues raised by appellants. As the court's opinion indicates, appellants raise several other substantial issues, some of which were unnecessary for the court to reach because the case is being reversed and remanded on the issue the dissent does address. Since the dissent would affirm rather than reverse, it would apparently decide all these other issues against appellants, but the dissent's failure to concur in part or even to mention any of the other issues in these cases is curious.

⁶⁸ Some comments on a few of these other issues may be useful. Appellants Bailey and Walker seek to have their cases severed from that of appellant Cooley because of alleged prejudice from inconsistent and conflicting defenses (Bailey and Walker assert that they were forced to leave by conditions in the jail, while Cooley claims that, in addition to conditions in the jail, Bailey and Walker forced him to leave). The trial court denied a pretrial motion to sever based on prejudicial joinder under Rule 14, FED. R. CRIM. P., and refused to change its ruling after the evidence had been presented. For the first time on appeal appellants raise the further argument that joinder of all three cases in the indictment was improper under Rule 8(b), FED. R. CRIM. P. The Government responds that any Rule 8(b) objection was waived because it was not raised before trial. It claims that the Rule 14 motion made before trial cannot serve as a substitute for a Rule 8(b) objection. On remand appellants will be given a chance to raise their Rule 8(b) objection in timely fashion, and the trial court will have the benefit of knowing the precise nature of the alleged inconsistency of defenses if and when it again considers the issue of prejudicial joinder.

Appellant Bailey also argues that he was prejudiced by the introduction of evidence of a prior conviction of escape. This conviction was one for which he was allegedly in custody when he escaped, but Bailey claims that the prosecution could have relied solely on another conviction—of robbery—for which

ingly reversed and remanded to the District Court for further action consistent with this opinion.

Reversed and remanded.

he was also allegedly in custody, and thus could have avoided the prejudicial impact of the prior escape conviction. Since the statute requires that the escapee must have been in custody by virtue of a conviction, evidence of any conviction for which a defendant is in custody when he escapes is directly relevant as long as this element is disputed. In the case on which appellant Bailey relies, *United States v. Spletzer*, *supra* note 17, the defendant had *stipulated* to the conviction and confinement elements of the offense. This course is also open to appellant Bailey on remand.

WILKEY, *Circuit Judge, dissenting*: Traditionally, claims of compulsion have been governed by strict standards; defendants have been required to raise such issues within the framework of the affirmative defenses of duress and necessity, and these defenses have been precisely defined, carefully hedged, and subject to strict proof. In a radical departure from this approach, the majority holds that even if evidence is insufficient as a matter of law to make out a duress or necessity defense, it must nevertheless be presented to the jury as bearing, in some nebulous and undefined way, on a defendant's "voluntariness" and "intent". Although my colleagues do not seem to realize it, this bouleversement effectively abolishes the defenses of duress and necessity, and the salutary standards embodied in them. In their stead it places vague, expanded, and essentially determinisitic concepts of "intent" and "voluntariness," whose just application, no matter how well-intentioned, is obviously fraught with difficulties. I respectfully dissent.

I. THE FACTS

In the early morning hours of 26 August 1976 officers of the District of Columbia Detention Facility discovered that an escape had been effected through a low-level window in the Northeast-1 housing unit. A check of the unit revealed that three prisoners—Bailey, Cooley, and Walker—were among those escaped. Bailey, serving a sentence of 23 years at the time, had been convicted in 1973 of bank robbery and attempted escape. Walker, serving a 15-year sentence, had been convicted in 1973 of bank robbery. Cooley, doing 5 years, had been convicted in May 1976 of possession of an unregistered firearm.

Cooley, Bailey, and Walker were later apprehended in the District of Columbia by FBI agents on 27 September, 19 November, and 13 December 1976, respectively. On

23 November 1976 all three were indicted for escape from custody, a violation of 18 U.S.C. § 751(a), and prison breach, a violation of 22 D.C. Code, § 2601. On 8 March 1976 a jury trial commenced in the United States District Court for the District of Columbia before District Judge Oliver Gasch.

A. *The Evidence*

During trial the defendants did not dispute that they had escaped from jail, but they offered a great deal of evidence to establish their contention that the escape was justified in view of the desperate conditions there. Several witnesses were produced who had been incarcerated with defendants. Their testimony was offered to establish that frequent fires, assaultive and threatening conduct by corrections officers, and lack of adequate medical attention combined to make conditions so unbearable that defendants were compelled to flee for their own well-being. The basic issue on this appeal is whether or not, and in what manner, the jury should have been instructed to consider this evidence.

1. *The Fires*

Several prison inmates incarcerated with defendants in the Northeast-1 unit testified that fires were frequently set there. One inmate said that they occurred every day.¹ Estimates varied on how long the fires were allowed to burn. One prisoner thought they lasted for an hour,² while another testified that they lasted for an hour and a half and that the smoke remained all night.³ The same prisoner said that the guards "just let them burn until

¹ Tr. 150.

² Tr. 377.

³ Tr. 390.

they burn out".⁴ *However, there was no evidence of a fire on 26 August 1976, the day of the escape.*

The Assistant Administrator of Operations at the facility, called to the stand by defendant Walker, contradicted these allegations. While he acknowledged that there had been small fires set in Northeast-1, he said that the inmates themselves had set the fires⁵ and that the officers on duty had promptly extinguished them.⁶ After the fires had been put out, exhaust fans were turned on to clear the smoke from the air, and medical attention was provided for anyone found to be in need of it.⁷ A corrections officer who had been stationed in Northeast-1 in the summer of 1976 recalled that fires were set in the unit every week, but that they lasted only five to seven minutes.⁸ He testified that, to his knowledge, no officer had ever permitted a fire to burn without acting to extinguish it.⁹

2. *Abusive Conduct by Guards*

Testimony was also elicited that beatings were frequently administered to the inmates by corrections officers stationed in Northeast-1. One inmate claimed that they took place on a daily basis.¹⁰ Another inmate reported seeing a group of six or seven guards attack defendant Bailey with blackjacks and mace.¹¹ *This incident oc-*

⁴ Tr. 378.

⁵ Tr. 203; 206.

⁶ Tr. 209.

⁷ Tr. 236.

⁸ Tr. 354.

⁹ Tr. 363.

¹⁰ Tr. 155.

¹¹ Tr. 368.

*curred, according to the inmate, more than three weeks before Bailey's escape.*¹² The inmate also claimed that he had seen a guard hit defendant Cooley in the face with a blackjack.¹³ He said that this conduct also occurred in early August 1976.¹⁴

Threats by the guards were also the subject of a good deal of testimony. A prisoner testified that in August he had received a beating by one of the guards who then told him to deliver a message to defendant Bailey to the effect that the guards were going to kill him and beat him for testifying in a particular court case.¹⁵

Once again the Assistant Administrator of Operations told a different story:

[W]e have not found any instance where either one of these young men were attacked by anyone. It has been the other way around in most cases.¹⁶

He acknowledged that he had received reports of situations requiring the use of physical restraint by officers in the section. He described one incident in which "Mr. Bailey came back into the housing unit and made an unprovoked attack on another resident . . . [and] two officers pulled Mr. Bailey off the man, restrained him."¹⁷ A corrections officer testified that during the month of August there had been no beatings of inmates by any corrections officer.¹⁸

¹² Tr. 380.

¹³ Tr. 373-374.

¹⁴ Tr. 382.

¹⁵ Tr. 154.

¹⁶ Tr. 255.

¹⁷ Tr. 232.

¹⁸ Tr. 354.

3. Lack of Medical Attention

The allegation that deprivation of required medical care led to dangerous conditions at the jail was advanced principally by appellant Walker. Seeking to establish that he had an epileptic condition requiring frequent medication which was not adequately supplied, the defense called Dr. Samuel Bullock, Chief Medical Officer at the New Jail. However, Dr. Bullock's testimony established only that medication for the control of epileptic seizures *had been prescribed* for Walker. It had been prescribed at the infirmary on a trial basis since the only information available on appellant's "condition" was that contained in the medical history provided by Walker himself.¹⁹ When closely questioned about how often the medication had been received, Dr. Bullock said:

This is still a trial basis. We have no evidence that Mr. Walker had any—was even an epileptic.²⁰

The doctor further testified that the time period for receipt of medication on a trial basis is set up by the prescribing doctor in each case, and that the medication was prescribed in Walker's case merely as a precautionary measure.²¹

Appellant Walker also called Dr. Aris Karas, staff psychiatrist at the United States Penitentiary in Leavenworth, Kansas. Dr. Karas had treated Walker at Leavenworth after he had complained of seizures coming in his sleep. Dr. Karas was very clear about whether epilepsy had actually been diagnosed in Mr. Walker's case:

I want to make, with Your Honor's permission, one point clear . . . I did not make a diagnosis of seizure disorder . . . [b]ecause nobody witnessed it

¹⁹ Tr. 438-439.

²⁰ Tr. 441.

²¹ Tr. 458-459.

from the staff or from the employees . . . It was only diagnosed convulsive disorder by history.²²

4. Defendant's Testimony

Defendant Cooley testified that on the morning of the escape, the correctional officers on duty opened the door to his cell, allowing him to leave. Once outside the cell, he encountered Bailey and Walker, who allegedly forced him to escape by threatening to kill him:

[L]ike I was out of my cell. They said, "You be gone or we're going to kill you." I say, "Man, I ain't escaping." They say, "Man, you're out of your cell. We don't trust you. You're going out." Just like that.²³

Later, however, Cooley testified that he left the jail by himself and that he did not know whether Bailey and Walker left at all.²⁴ When asked if he had ever made an attempt after leaving prison to notify anyone in authority about the escape, he said that he did not know anyone to call.²⁵

Defendant Bailey also testified about the circumstances leading up to his escape. As he was lying in bed in the early morning hours of 26 August, his door suddenly opened, and he then left the jail. When asked to supply the details of how he was able to leave, he claimed that he did not remember:

I don't even remember. It seems like I just blacked out . . . I have been trying to figure it out. I admit I left that jail. There is no doubt about it. I swear

²² Tr. 680-681.

²³ Tr. 406.

²⁴ Tr. 424-425.

²⁵ Tr. 408.

to God I left there . . . all I can say is I just don't remember. I just blacked out that morning.²⁶

Fortunately, Bailey's memory improved following luncheon recess when he was cross-examined by defendant Walker. After admitting that his prior testimony about blacking out was not truthful,²⁷ he went on to give the details of his escape. As he was walking down the unit hall, he discovered that the window in Walker's cell had been removed; he entered the cell and climbed down some bed sheets already hanging from the window. After escaping he made no effort to surrender himself to the authorities.²⁸

Defendant Walker's testimony was quite brief. After complaining about conditions in the jail, he asserted that after his escape he had contacted the proper authorities. Specifically, he said that he "kept a constant rapport with the FBI"²⁹ but admitted that he never surrendered himself to their custody. Walker also denied seeing Cooley the day of the escape.

B. The Instructions

At the close of the evidence the defendants requested the court to instruct the jury on the affirmative defense of duress—that is, to instruct the jury that it could find that the defendants had been compelled to escape by conditions at the jail and that such escape was justified. In a conference on the proposed instructions, however, the court ruled that the affirmative defense of duress was

²⁶ Tr. 550.

²⁷ Tr. 559.

²⁸ Tr. 563-564.

²⁹ Tr. 710-711: This assertion of "constant rapport" was contradicted on rebuttal by the FBI special agent responsible for the case. (Tr. 730-732).

not available to defendants, since none of them had surrendered to authorities after their escape. The court said:

Had these men notified the authorities or the public defender in an effort to surrender under conditions that might have been arranged by the public defender, then I would have permitted the duress and condition argument. In fact, I have here an instruction, which I drew up very carefully, with that in mind, but I realized that at the end of which I was calling upon the jury to make a finding that they couldn't make, that is to say that these men had turned themselves in, and that is a prerequisite to the assertion of the defense of duress or coercion. So, for that reason I decided that I had to assume the responsibility myself.³⁰

The Court therefore rejected the defendants' proposed instruction and instructed the jury as follows:

You are instructed as a matter of law that conditions at the District of Columbia Jail or the new detention center, no matter how burdensome or restrictive an individual inmate may find them to be, are not a defense to the charges in this case, nor justification for the commission of the offense of escape.

If a particular inmate or group of inmates feel that they have been treated unfairly, they may seek correction of those conditions in the court system, but they are not entitled to commit the offense of escape or seek to take the law into their hands.

Now, the court permitted the defendants to introduce this evidence and to seek to show that following their escape they turned themselves in, for if one, after escaping, has turned himself in, then the defense of coercion or duress may be brought to the attention of the jury *as a defense*, but only if a defendant turns himself in.

³⁰ Tr. 778-779.

Now, there are recognized procedures for this to be done, and requisite protections insured by such action. As the court heard the evidence, that was not done in this case. *So the court felt that it was incumbent upon the court to assume responsibility for this aspect of the case, and to take it out of the case in effect. So, you are not to consider the defense of duress or coercion for the reasons stated. The defendants did not turn themselves in.*³¹

Thus, the judge did not foreclose jury consideration of this evidence altogether; he simply ruled out the duress defense.

In addition, defendant Bailey urged the court to instruct the jury that escape from custody was a "specific intent" crime, and that the Government was required to prove that defendants specifically intended to avoid confinement *permanently* at the time they escaped from jail.³² The court rejected this proposed instruction and instead instructed the jury that a defendant "escapes" if he "without authorization did absent himself from his place of confinement" and that this offense was a "general intent crime".³³ The court further instructed the jury on the precise meaning of "general intent".³⁴

C. The Verdict

On 14 March 1976 the jury found each defendant guilty of escape from custody. Pursuant to the court's instructions, the alternate charge of prison breach was not considered by the jury after they reached a verdict on the escape count. Each defendant was sentenced to a term of five years in prison, to be served consecutively to any sentence already imposed. These appeals followed.

³¹ Tr. 806-807 (emphasis added).

³² Tr. 773-774.

³³ Tr. 802; 799.

³⁴ Tr. 799-800.

II. THE ISSUES

The basic issue raised in these appeals is whether, and in what manner, the jury should have been instructed to consider defendants' evidence regarding fires, assaults by prison guards, and inadequate medical attention. The defendants contend that the jury should have been instructed on the affirmative defense of duress and permitted to consider the evidence in connection with that defense. However, the majority holds that, regardless of whether the evidence was sufficient as a matter of law to make out an affirmative defense of duress, it should have been submitted to the jury as relevant to the "intent" and "voluntariness" elements of the crime of escape.³⁵

Thus, in order to determine whether the trial court erred in instructing the jury as it did, three questions must be addressed:

1. Was the evidence adduced by defendants sufficient to provide a basis for an instruction on the defense of duress?
2. Apart from the availability of the duress defense, should the evidence have been expressly submitted to the jury as bearing on the "voluntariness" of the defendants' actions?
3. Should the evidence have been expressly submitted to the jury as bearing on the "intent" element of the crime of escape?

III. THE DEFENDANTS' DURESS THEORY

Defendants argue that the trial court committed reversible error by rejecting the proffered instruction on the defense of duress and by refusing to permit the jury to consider, in connection with such a defense, the evi-

³⁵ Majority Opinion at 10, 11, 16.

dence regarding fires, assaults by prison guards, and inadequate medical care.

While it is generally true that a defendant is entitled to an instruction on his theory of the case when it is properly requested by counsel,³⁶ it is well settled that an instruction should not be given if it lacks evidentiary support.³⁷ In a case in which evidence has been presented in an attempt to raise an affirmative defense, the trial court has the duty of determining whether the issue is sufficiently supported by the evidence to place it before the jury.³⁸ When the evidence fails to establish the defense, there is no factual issue to be decided by the jury, and the instruction is properly refused by the trial court as a matter of law.³⁹

The evidence here failed on at least two grounds, as a matter of law, to establish the defense. First, although the defendants offered much evidence describing conditions which allegedly compelled them to escape, it is clear that, by all previous standards, the requisite degree of compulsion was not shown. Second, the evidence failed to show that any of the defendants turned themselves in to authorities after escaping those conditions. The trial court made a specific finding that lack of evidence on this point placed the duress issue in such a factual posture that it could not properly be decided by the jury as a

³⁶ *Brooke v. United States*, 128 U.S. App. D.C. 19, 385 F. 2d 279 (1967).

³⁷ *E.g. United States v. Waskow*, 519 F. 2d 1345 (8th Cir. 1975).

³⁸ See *United States v. Glassel*, 488 F. 2d 143 (9th Cir. 1973), cert. denied, 416 U.S. 941 (1974); *United States v. Teeslink*, 421 F. 2d 768 (9th Cir. 1970).

³⁹ *United States v. Glassel*, supra; *United States v. Ramsey*, 374 F. 2d 192 (2nd Cir. 1967).

matter of law. It therefore refused to submit the defense to the jury.

After a consideration of the duress defense in general, I turn first to the requirement of a prompt return to custody, and then to the requirement of immediate overpowering compulsion to establish the duress defense. Not one, but both, requisites are undeniably missing in the case at bar.

A. *The Duress Defense in General*

Where the evidence as to the acts performed by the defendant is largely undisputed—as the departure from the jail of each defendant here—there are essentially two kinds of defenses in the criminal law. One type of defense negatives guilt by cancelling out the existence of some required element of the crime—either the *actus reus* or the “intent” element. For example, mistake of fact, intoxication, and insanity are defenses designed to establish that the defendant did not have the “intent” element required for the crime charged.⁴⁰

The second kind of defense operates on an entirely different principle. It does not negative any element of the crime but instead goes to show some circumstance of excuse or justification which is deemed a bar to the imposition of criminal liability; that is, it goes to the matter of criminal responsibility.

Traditionally, claims of duress, compulsion and necessity are treated as defenses of the latter type.⁴¹ Under the classic “duress” defense, a defendant will be excused from committing an otherwise criminal act if he was *compelled* to perform the act by the unlawful threats

⁴⁰ W. Lafave & A. Scott, *Handbook on Criminal Law* § 8 at 46-47 (1972) [hereinafter cited as Lafave & Scott].

⁴¹ *Id.* §§ 49, 50.

of another person. The defense has three elements. First, in order to excuse the commission of a criminal act, the coercion must be *present, imminent, and impending* and of such a nature as to induce a well-grounded apprehension of *death or serious bodily injury*. Second, there must be no opportunity to avoid the threatened harm. And finally, the defense may never be raised to justify the taking of innocent life.⁴²

The theoretical basis for the duress defense is excuse; though the act is considered wrongful, the actor is not held responsible because he has taken the best possible course of action in a situation in which his “free will” has been severely curtailed but not entirely eliminated. Thus, the rationale for the defense is not that the defendant, faced with the unnerving threat of harm unless he does an act which violates the literal language of the criminal law, somehow loses his mental capacity to commit the crime in question. Rather, it is that, *although a defendant has the mental state which the crime requires, his conduct which violates the literal language of the criminal law is excused or justified because he has thereby avoided a harm of greater magnitude*. Thus, the defense of duress rests on the social utility of a defendant’s actions when faced with a choice of evils. For example, if A, armed with a gun, threatens B with immediate death unless B steals C’s car, B is not guilty of larceny because it is better for society as a whole that B do the lesser harm (commit the larceny) than acquiesce in the greater harm (his own loss of life). On the other hand, if A threatens B with immediate death unless B *kills* C, B will *not be excused* of homicide if he kills C, since it is not necessarily better for society that B kill C than that A kill B.

⁴² *E.g. Shannon v. United States*, 76 F. 2d 490, 493 (10th Cir. 1935); Lafave & Scott § 49; Perkins *Criminal Law* 951-54 (2nd. ed. 1964) [hereinafter cited as Perkins].

The same considerations apply to the defense of necessity. The pressure of natural physical forces often confronts a person in an emergency with a choice between two evils: either the person may violate the literal terms of the criminal law and thus produce a harmful result, or he may comply with those terms and thus produce a greater or equal amount of harm. For reasons of social policy, if the harm which will result from compliance with the law is greater than that which will result from violation of it, he is justified in violating it. Under such circumstances, he is said to have the defense of necessity.⁴³ The rationale of the necessity defense is not that the person, when faced with the pressure of circumstances of nature, lacks the mental state which the crime requires. Rather, it is that the public interest requires the selection of the lesser of two evils.

Necessity is usually distinguishable from duress because the emergency situation compelling a choice between evils is caused by forces of nature rather than coercion by other human beings. Some commentators have suggested that this is the only real difference between the defenses.⁴⁴ Others claim that there are further conceptional differences between the two. Whether or not they are actually distinct, they have been hopelessly commingled in case law.⁴⁵ The result has been the development of a hybrid defense—a “duress-necessity” defense—which re-

⁴³ Lafave & Scott § 50; Perkins at 956-961.

⁴⁴ Lafave & Scott § 50. See Note, Duress—Prisons and Prisoners—Duress is a Defense to a Prison Escape, 43 U.Cin. L.R. 956 (1974); Note, Prisons—Escape—Necessity as a Defense, 37 Mo. L.R. 550 (1972).

⁴⁵ See Gardner, The Defense of Necessity and the Right to Escape from Prison—A Step Towards Incarceration Free From Sexual Assault, 49 So. Cal. L.R. 110, 123 (1975) [hereinafter cited as Gardner].

tains the basic features of the duress defense, but which encompasses compulsion arising from natural forces in addition to coercion by other persons. For convenience, the term “duress defense” will be used hereafter in referring to both the classic duress defense and the hybrid duress-necessity defense.

B. *The Return to Custody Requirement in Escape Cases*

In escape cases the duress defense has posed special problems for the courts. Recognizing that the defense carries within itself the germ of potential disorder even in ordinary cases, courts have been concerned that its casual application in escape cases could subvert prison discipline and endanger corrections personnel. Moreover, courts have recognized that, in escape cases more than in other types of cases, the defense is particularly susceptible to manipulation by the shrew and unscrupulous. There already exist among inmates powerful incentives to escape; the prison population is generally composed of recalcitrant individuals; the circumstances of prison life are such that at least a colorable, if not credible, claim of duress or necessity can be raised with respect to virtually every escape, and disproof of such claims can be quite difficult. Finally, in weighing the interests of the prison inmate against those of society as a whole, the courts have realized that society has an especially compelling interest in insisting that prisoners serve their full and uninterrupted sentences, since it is precisely upon the ineluctability of such punishment that the effectiveness of the penal system and, in turn, the safety of each citizen depends.

In view of these considerations, the duress defense has been more carefully hedged and subject to stricter proof in escape cases than in other types of cases. To prevent either before-the-fact fabrication by groups of inmates or after-the-fact construction to avoid punish-

ment, the courts have set down strict standards which must be met before the defense is available.

The most comprehensive explication of these standards is provided in *People v. Lovercamp*,⁴⁶ an escape case in which the California Court of Appeals considered the availability of the duress defense. There, two defendants had been threatened repeatedly by a group of inmates who sought to force them to perform lesbian acts. When their complaints to the prison authorities elicited no response and they were again confronted by a threatening group that promised to return to gang rape them, they fled. They were immediately apprehended a few yards from the prison. When the defense of duress was raised at trial, the court refused to instruct the jury on it. In holding that the defense was available to the defendants, the Court of Appeals set forth five conditions that must be established before the defense could be submitted to the jury:

. . . [W]e hold that the proper rule is that a limited defense of necessity is available if the following conditions exist: (1) The prisoner is faced with a specific threat of death, forcible sexual attack or substantial bodily injury in the immediate future;

(2) There is no time for a complaint to the authorities or there exists a history of futile complaints which make any result from such complaints illusory;

(3) There is no time or opportunity to resort to the courts;

(4) There is no evidence of force or violence used towards prison personnel or other "innocent" persons in the escape; and

⁴⁶ 43 Cal. App. 3d 823, 118 Cal. Rptr. 110, 69 A.L.R. 3d 668 (1974).

(5) The prisoner immediately reports to the proper authorities when he has attained a position of safety from the immediate threat.⁴⁷

The first of these requirements corresponds to the rule applicable to duress cases in general that the compulsion must be present, imminent and impending and of such a nature as to induce a well-grounded apprehension of immediate death or serious bodily injury. If the danger threatened is not *immediate*, the defense is not available.⁴⁸ The defense is reserved for back-to-the-wall situations. This requirement has been adopted by every court that has considered the availability of the defense in escape cases. Accordingly, the courts have uniformly agreed that prison conditions alone, no matter how intolerable and inhumane, do not justify or excuse escape.⁴⁹

The second and third requirements set forth in *Lovercamp* reflect the general rule that the defendant must have exhausted all reasonable means of avoiding the threatened harm. Thus, an escapee's claims of compulsion must be rejected if he could have avoided danger by resorting to administrative remedies within the prison, or by seeking judicial intervention. Once again, these requirements have been generally adopted by the courts.⁵⁰

The fourth requirement enunciated in *Lovercamp* is a *stricter version* of the general rule that duress never excuses the taking of innocent life. The added strictures

⁴⁷ 118 Cal. Rptr. at 115 (footnotes omitted).

⁴⁸ *E.g. State v. Green*, 470 S.W. 2d 565 (Mo. 1971), *cert. denied*, 405 U.S. 1073 (1972).

⁴⁹ *E.g. Dempsey v. United States*, 283 F. 2d 934 (5th Cir. 1960); *Grubb v. State*, 533 P. 2d 988 (Okla. Crim. App. 1975); *Hinkle v. Commonwealth*, 66 S.W. 816 (Ky. 1902).

⁵⁰ *E.g. Dempsey v. United States*, 283 F. 2d 934 (5th Cir. 1960); *People v. Hocquard*, 236 N.W.2d 72 (Mich. 1975); *Matthews v. State*, 288 So. 2d 712 (Miss. 1974).

are a response to the fact that recognition of the defense in escape cases increases the risk of physical injury to corrections personnel as well as to other inmates. Most duress-escape cases that have reached the courts, however, have involved non-violent escapes, and, consequently, few courts have explicitly adopted this requirement, but it has been recognized by the Seventh Circuit.⁵¹

The fifth requirement of the duress defense set forth in *Lovercamp* is obviously of decisive significance in this case. It requires an escapee to report *immediately* to proper authorities once he has attained a position of safety. In the *Lovercamp* case itself the defendants had established all elements of the duress defense but this final "return" requirement; however, the court found the issue incapable of resolution since they had been apprehended immediately on their departure. Since the *Lovercamp* decision, this "return" requirement has found increasingly wide support among courts considering duress-escape cases, including 1977 decisions in the Ninth Circuit and the District of Columbia Court of Appeals.⁵²

There are essentially two reasons for insisting on return as a condition precedent to accepting a defense of duress. The first is a policy reason. The "return" requirement is designed to mitigate some of the special problems attending application of the duress defense in escape cases. It is meant to narrow application of the defense to those who are in genuine fear of death or serious bodily harm because they otherwise have nothing

⁵¹ *United States v. Nix*, 501 F. 2d 516, 519 (7th Cir. 1974).

⁵² *United States v. Michelson*, 559 F. 2d 567 (9th Cir. 1977); *Stewart v. United States*, 370 A. 2d 1374 (D.C. Ct. App. 1977); *People v. Hocquard*, 220 N.W. 2d 212 (Mich. 1974); *State v. Worley*, 220 S.E. 2d 242 (S.C. 1975). See *People v. Wester*, 46 Cal. Rptr. 699 (1965); *State v. Palmer*, 72 A.2d 442 (Del. 1950).

to gain by escaping if they must surrender themselves immediately. In this regard the *Lovercamp* court observed:

Thus, the defense becomes meaningless to one who would use it as an excuse to depart from lawful custody and thereafter go his merry way relieved of any responsibility for his unseemingly departure. A prisoner cannot escape from a threat of death, homosexual attack or other significant bodily injury and live the rest of his life with an ironclad defense to an escape charge.⁵³

The second, and most important, reason for conditioning the availability of the duress defense on an escapee's return to custody relates to the nature of the crime of escape itself. Under many statutes, escape has been held to be a "continuing" crime; that is, the offense is not complete when the escapee initially departs from custody but continues as long as he remains at large. Thus, under these statutes, even though a prisoner may have originally been justified in departing from custody, if he thereafter remains at-large, his continued unexcused absence from custody constitutes the crime of escape. Accordingly, if a defendant presents evidence justifying only his initial departure, such evidence would—as a matter of law—be an insufficient defense, since it would fail to excuse his subsequent continued absence.

The federal escape statute, 18 U.S.C. § 751, is unquestionably a statute of this type. The courts of appeals have consistently held this to be so.⁵⁴ It is no surprise,

⁵³ 118 Cal. Rptr. at 115.

⁵⁴ *United States v. Michelson*, 559 F.2d 567 (9th Cir. 1977); *United States v. Spletzer*, 535 F.2d 950 (5th Cir. 1976); *United States v. Joiner*, 496 F.2d 1314 (5th Cir.), cert. denied, 419 U.S. 1002 (1974); *United States v. Chapman*, 455 F.2d 746 (5th Cir. 1972); *United States v. Coggins*, 398 F. 2d 668 (4th Cir. 1968); *Chandler v. United States*, 378 F. 2d 906 (9th Cir. 1967).

then, that in the recent Ninth Circuit case of *United States v. Michelson*, the "return" requirement was expressly held to be a precondition to the availability of the duress defense in federal escape cases.⁵⁵

In *Michelson*, the defendant-escapee was arrested and charged with escape two years after his unauthorized departure from a U.S. penitentiary in which he had been serving a 22 year sentence for armed robbery. At trial the defendant attempted to raise a duress defense, presenting evidence that he had had a violent fight with another inmate; that as a result of the fight, he was hospitalized for several days, while the other inmate was placed in solitary confinement; that the other inmate threatened to kill him; and that the defendant escaped the same day the other inmate was released from solitary confinement. The trial court refused to instruct the jury on the duress defense. Defendant challenged his conviction on the ground that the trial court erred in not granting the instruction. The Ninth Circuit affirmed the trial court, specifically holding that escape under 18 U.S.C. § 751 is a continuing offense and that an escapee must turn himself in to proper authorities as a prerequisite to the availability of the duress defense:

Although duress may excuse the inmate's departure, it does not absolve his continued absence from custody. In other words, while coercion may shield the escapee from the imposition of additional punishment, it does not commute the sentence previously imposed. Thus, while the Court recognizes the availability of the duress defense to the crime of escape under proper circumstances, *the Court also recognizes that duress exonerates only the departure from custody, and not the continued absence.*

For this reason, an escape will not be excused by reason of duress if the escapee fails to submit

⁵⁵ 559 F.2d at 570.

to proper authorities immediately after attaining a position of safety. The inmate's failure to submit to proper authorities following the allegedly coerced escape amounts to an unexcused commission of the crime of escape. Therefore, when an escapee fails to submit to proper authorities, the asserted duress defense must be rejected because as a matter of law it does not negate the continued absence from custody.

Similarly, prior cases interpreting the escape statute, Section 751(a), have found that continued absence from custody constitutes the crime of escape.

. . . .

In this case, we need not and do not decide whether defendant acted out of duress in escaping. His failure to report to the proper authorities during his nearly two years of freedom following his escape from McNeil Island Penitentiary precludes jury consideration of the asserted duress defense. Whatever the merits of the asserted duress defense, it did not license continued absence from custody.

. . .

We conclude that the trial court did not err in refusing to give the requested duress instruction because of defendant's failure to submit to custody after attaining a position of safety.⁵⁶

Non-federal courts considering the availability of the duress defense in escape cases have also deemed the *Lovercamp* requirements, including the "return" requirement, a correct statement of the law.⁵⁷ The *Lovercamp* standards have been termed "minimum conditions" which must be satisfied before the duress defense is available,⁵⁸ and

⁵⁶ *Id.* at 570-71.

⁵⁷ See, e.g., state cases cited at note 52, *supra*.

⁵⁸ *State v. Worley*, 220 S.E.2d at 243.

it has been held that the defense may be considered by the trier of fact only "where there is a *prima facie* showing of evidence to support each and every one of the . . . elements."⁵⁹

In *Stewart v. United States*,⁶⁰ a District of Columbia case, the defense of duress was raised by an inmate of a halfway house who failed to return from the community at the required time and was prosecuted for escape under 22 D.C. Code, § 2601. The defendant claimed that he had been abducted while returning to the halfway house and shot while fleeing his abductors. He feared to return to the house where he would be a "sitting duck" for his assailants. When he telephoned the halfway house, he was told to turn himself in, but he waited a month and a half before doing so. In affirming the trial court's ruling that such facts did not make out a valid defense, the District of Columbia Court of Appeals held that, when such a defense is raised

the defendant must establish that he *immediately* returned to custody once the threat of harm was no longer imminent. A failure to surrender oneself after the threat has dissipated must be viewed as an escape accompanied by the intent to elude lawful custody. See *United States v. Chapman*, 455 F.2d 746 (5th Cir. 1972).

. . . Even assuming that initially he acted out of fear of immediate death or serious bodily injury, the proffer failed to establish that the threat of injury remained imminent and that his fear of harm was reasonable during that time period, or that he immediately returned to custody once the alleged threat had dissipated.⁶¹

⁵⁹ *People v. Hocquard*, 236 N.W.2d at 75.

⁶⁰ 370 A.2d 1374 (D.C. Ct. App. 1977).

⁶¹ *Id.* at 1377 (emphasis added).

In the present case the trial court's ruling that the defense raised by defendants had not been established as a matter of law is amply supported by the record. No evidence whatsoever was adduced to show that defendants turned themselves in after they had escaped the danger they alleged existed. Defendants Bailey and Cooley admitted that they did not even attempt to call the authorities after escape, and though defendant Walker claimed a "constant rapport with the FBI," there was no evidence that he ever attempted to arrange surrender. In short, the defense evidence was completely lacking as to the essential "return" requirement, and the trial court properly excluded the matter from the jury's consideration.

Defendants argue that once a prisoner has escaped from danger, he should not be expected to return to the source of that danger and place himself again in harm's way. Presumably defendants believe that an escapee is entitled henceforth to go his merry way with a permanent and ironclad defense. This position completely ignores the rule that the duress defense is available only when there is *no reasonable alternative* to violation of the law. Once a prisoner escapes the immediate threat of death or serious bodily injury with which he was allegedly confronted in prison and is at large, he has open to him virtually an infinite variety of reasonable alternative means by which he can avoid these threats in the future without further violating the law by remaining at large. He can turn, for example, to the community, to public agencies, to public or private legal services, to politicians, to church groups or other private organizations that are in a position to take the action necessary to protect him from untoward danger once he returns to custody. The law imposes a duty on the escapee, once free, to pursue these legitimate means of redress, rather than to pursue self-help through continued criminality.

An escapee's generalized apprehensions that legal means of self-protection may not be as efficacious as illegal means do not excuse or justify his continued absence from custody. Each moment he remains at large he is actively breaking the law. To excuse or justify his continued absence on the basis of duress or compulsion, then, he must adduce some evidence that the dangers which originally impelled his escape remain imminent *and that there is no alternative means for him to protect himself from these dangers except by remaining at large*. Because of the various opportunities which fugitives have for redress, it is almost impossible to conceive of circumstances under which an escapee could make a showing that his continued absence was justified. Be that as it may, however, the fact is that defendants in the instant case have *not even attempted to justify their continued absence*. Under these circumstances, the duress defense is simply not available to them.

The majority acknowledges that the crime of escape under 18 U.S.C. § 751 is a "continuing" offense. It further acknowledges that this feature of the crime has given rise to the substantive rule of law that duress is available as a defense in escape cases only where an escapee has adduced evidence either (1) that he immediately surrendered to proper authorities upon attaining a position of safety from the immediate threat, or (2) that his continued absence from custody was justified because (a) the dangers that originally impelled his escape remained imminent *and* (b) there were no alternative means for him to protect himself from these dangers except by remaining at large. Having acknowledged these two points, the majority *cannot* logically avoid the conclusion—the inexorable conclusion—that defendants in this case were not entitled, as a matter of law, to a duress instruction.

In the first place, defendants *admit* that they did not return to custody; there is no factual dispute on this. In the second place, defendants have adduced *no evidence whatever* justifying their continued absence from custody. It is fundamental that an instruction should not be given if it lacks evidentiary support; when evidence fails to establish the defense, there is no factual issue to be decided by the jury, and the instruction is properly refused by the trial court *as a matter of law*.⁴² Clearly, the trial court in this case properly withheld the duress instruction.

The majority labors to avoid this conclusion by resorting to a patently frivolous argument concerning the scope of the indictment and instructions in this case. It dissects the crime of escape into two *separate and distinct* activities: first, unauthorized departure from custody, and, second, unauthorized continued absence from custody. It then treats these "separate" activities as "separate" offenses, contending that the defendants were not properly indicted for the distinct crime of continued absence from custody because the indictment refers to "flee[ing] and escap[ing]" "[o]n or about August 26, 1976" and that the trial court "emphasized the notion that the offense took place when [defendants] left the jail on August 26." Concluding that defendants "were being tried only for leaving the jail on August 26, and not for failing to return at some later date," the majority asserts that the trial court was precluded from relying on the continuing nature of the offense in refusing to grant a duress instruction.⁴³

⁴² *E.g.*, *United States v. Waskow*, 519 F.2d 1345 (8th Cir. 1975); *United States v. Glassel*, 488 F.2d 143 (9th Cir. 1973), *cert. denied*, 410 U.S. 941 (1974); *United States v. Ramsey*, 374 F.2d 192 (2nd Cir. 1967).

⁴³ *Maj. Op.* 25-26.

The fatal flaw in the majority's argument is that it treats the initial-departure aspect of escape and the continued-absence aspect of escape as two separate acts and two distinct offenses. They are not; they are necessary aspects of *one act—one single criminal transaction*. As the trial court instructed the jury in this case, escape consists in "absenting" oneself from custody. Obviously, in order to absent oneself from custody, one must depart from custody. Similarly, one cannot have "departed" from custody without having actually remained absent from custody for an appreciable period. The act of absenting oneself from custody necessarily entails not only the initial severance of control but also the maintenance of that status for an appreciable period of time, whether that be one minute or one hour or one year.

The fact that the trial court did not provide the jury with a full explication of the "continuing offense" aspect of the crime of escape is really without significance in this case and certainly is not relevant to the majority's argument. The majority's complaint is that the trial court precluded jury consideration of a duress defense and held as a matter of law that the defense was unavailable. However, the majority concedes that *if* the court had instructed the jury fully as to the "continuing offense" aspect of escape, then it could properly have held *as a matter of law* that the duress defense was unavailable and thereby have precluded jury consideration of the defense. Why should the result be different simply because in one case the trial court did not fully illuminate the "continuing offense" aspect of the offense for the jury and in the other case it did? *The jury is not making the decision on the availability of the defense in either case; the court is making the decision in both cases as a matter of law. The amount of information conveyed to the jury is therefore irrelevant to the propriety of the trial court's legal decision.*

The fact that the trial court in this case did not fully explain the "continuing offense" nature of escape had *only one* real practical effect. It deprived the jury of insights that would have made it *easier* to convict defendants. In fact, if the jury had been fully instructed on the continuing offense aspect of escape, it would have been *irrational* for it to have acquitted defendants, in light of the fact that defendants admitted remaining at large and failed to adduce any evidence to justify their continued absence. In other words, the trial courts' alleged omission was not only unprejudicial to defendants, but in fact affirmatively benefited them.

C. *The Immediate Compulsion Requirement in Escape Cases*

The trial court was justified in refusing to instruct the jury on the duress defense for still another reason. The majority does not, and *cannot*, deny the validity of the traditional requirements that a duress defense must be predicated on threat of *immediate* death or serious bodily harm and a showing that there was no opportunity to avoid the threatened harm—in other words, that the defense is reserved for *back-to-the-wall* situations. The evidence presented by defendants plainly did not meet these requirements.

Cooley was the only one of the defendants who actually claimed that he had been *compelled* to escape by any form of *immediate* danger. However, even he later repudiated this claim and testified that he had indeed *not* been forced to leave the prison by Walker and Bailey. The conditions described by other defense witnesses could hardly be found to establish the seriousness, immediacy, and imminence of danger required to make out duress. Walker's complaint that he was not being adequately treated for self-diagnosed epilepsy, even though appropriate drugs *had* been prescribed; the defendants' general

complaint that there had been, in the past, intermittent fires in the housing unit, even though there was no evidence that defendants' immediate safety had ever been endangered by these fires; and the defendants' general complaint that they had been subject to past "assaults" by prison guards, even though there was no evidence of an "assault" or even the utterance of a "threat" within approximately three weeks of the escape, simply do not present the back-to-the-wall situation necessary to make out a duress defense.

Similar, and even *more* compelling, complaints have been repeatedly rejected by the courts in scores of cases. Indeed, I invite the majority to cite *one* case, federal or state, in which claims of this type have been deemed sufficient to raise a duress defense. The majority is unable to do so because the defendants' complaints clearly fall far short of the severe and immediate danger necessary to warrant a duress instruction. The trial court was plainly correct in refusing to instruct the jury on defendants' theory of the case.

IV. THE MAJORITY'S "VOLUNTARINESS" THEORY

The majority suggests that, *regardless of whether the evidence presented by defendants was sufficient as a matter of law to make out an affirmative defense of duress*, it should have been submitted to the jury as relevant to the "voluntariness" of defendants' actions.⁶⁴ Finding that "voluntariness" is a necessary "element" of the crime of escape, the majority concludes that the trial court erred in precluding jury consideration of de-

⁶⁴ Majority Op. at 10: "[A] jury can consider whether evidence of jail conditions, threats, and violence such as that presented by appellants in the District Court raises reasonable doubts concerning a defendant's capacity to act 'voluntarily,' or his intent to avoid confinement." (Emphasis supplied.) See also Maj. Op. at 10, 17.

fendants' evidence of medical inattention, assaults, and fires.

The term "voluntary" is frequently used in two different ways in the criminal law.

In one sense, the term "voluntary" has been used as meaning "volitional".⁶⁵ According to this usage, a "voluntary" act means only that an act is the product of the actor's will, *regardless of whether that will is freely exercised*. An act is "involuntary", then, where the actor's body is moved by overmastering physical force (*vis absoluta*) or where the actor's movements are a reflex or convulsion, or are performed during unconsciousness, sleep, or hypnosis. This type of "voluntariness", more properly called "volition", is treated under the rubric of *actus reus*, the physical element of crime. If a defendant's movements are not volitional, if they are involuntary, then they are not "acts" in the proper sense, and hence there is *no actus reus*. Thus, for example, if a prisoner has an epileptic fit during which he falls over the prison wall, or if he sleepwalks out the prison gate, or if he is carried out physically by other prisoners, then the *actus reus* of the crime of escape does not exist because the prisoner has not performed a volitional act. So, when the term "voluntary" is used as meaning "volitional", acts performed under duress are considered "voluntary" acts; even though they are not the products of the *free* will, they are nevertheless products of the will. Of course, the majority does *not* use the word "voluntary" in this sense.

The second way in which the term "voluntary" is used refers to exercise of the *free will*, rather than mere exercise of the will. In this context, an act is said to be "involuntary" where the will of an actor is subject to such coercive pressure (*vis compulsiva*) that it is

⁶⁵ Perkins at 749; Lafave & Scott at 179.

overborne, and the actor—"against his own will"—*chocses* to violate the law rather than obey it. Thus, for example, if a prisoner is forced at gunpoint to walk out of prison "against his own will", then he has not acted "voluntarily". It is in this "free will" sense that the majority uses the term "voluntary," and it is in this sense that the term will be used in this section.

The majority is unquestionably correct when it says that "voluntariness"—free will—is a necessary element in the crime of escape, for it is a necessary element in *all* true crimes. It is a basic precept in Anglo-American law that the exercise of "free" will is essential to criminal responsibility. A person who has been deprived of "free" will and has been compelled to act against his will should not be held responsible and punished for his actions.

With respect to the present case, the majority's position is simply this: the defendants' evidence regarding fires, assaults, and medical care have some bearing on whether the defendants were exercising "free will" when they departed from prison; therefore, the evidence should have been submitted to the jury on the issue of "voluntariness", even though it did not make out a defense of duress.

This position is utterly untenable. It is black-letter law that, in cases such as this, *issues of "voluntariness" are to be raised through the affirmative defense of duress*. When a defendant asserts that he was deprived of free will and did not act "voluntarily" because he was compelled to violate the law either by force of circumstances or by the threats of other persons, then he must raise these matters within the framework of the duress defense. This is why I stated at the outset that my colleagues did not seem to realize the radical revolution they were writing into the law, such a bouleversement that

it in reality abolishes the salutary standards that heretofore have governed the defenses of duress and necessity.

The doctrine of duress has been fashioned precisely for dealing with the issue of free will. As Professor Burdick writes in his treatise on criminal law:

Since every crime requires a willing or voluntary mind, it may be a defense to a criminal charge that the criminal act was not committed voluntarily but was the result of coercion, compulsion, or necessity. As said by Lord Mansfield: "Whenever necessity forces a man to do an illegal act, [whatever] *forces* him to do it, justifies him, because no man can be guilty of a crime without the will and intention of the mind." Blackstone has also said: "A species of defect of will is that arising from compulsion and inevitable necessity. These are a constraint upon the will whereby a man is urged to do that which his judgment disapproves, and which it is to be presumed, his will (if left to itself) would reject. As punishments are therefore only inflicted for the abuse of that free will which God has given to man, it is highly just and equitable that a man should be excused for those acts which are done through unavoidable force and compulsion".

....

From the general statements of Lord Mansfield and Judge Blackstone quoted above, it might be presumed that compulsion or necessity is a valid defense in all cases, but the doctrine is hedged about with certain positive rules of law, and is recognized only in clear cases. In some instances it is not recognized at all. . . .

In order to excuse a criminal act on the ground of compulsion or necessity, one must have acted under apprehension of imminent and impending death, or of serious and immediate bodily harm.⁶⁶

⁶⁶ 1 Burdick, Law of Crime §§ 198-199 at 260-62 (1946).

Other commentators observe:

Legal responsibility, be it civil or criminal, implies freedom. To make a contract in law requires the free acts of the participants, and the doing of a socially reprehensible act is legally excusable, where the actor was not a free agent. We find, therefore, that where that most precious of all commodities, "free will," is stolen, the law has hastened to erect its doctrine of duress to mark the larceny.

Criminal duress has, at its heart, the principle of freedom. The criminal law, wisely or not, has postulated for itself a world of free-will-ed agents and has fixed responsibility for action upon most classes of actors, except those who have "acted under compulsion."

The merits of such an attitude are clear. If a person commits an act under compulsion, responsibility for the act cannot be ascribed to him since, in effect, it was not his own desire, or motivation, or will, which led to the act. Punishment of the actor would be misdirected and futile since it would deter neither him nor others, should it be the case that all were equally compelled to do acts outside of their own control. Thus, the law has reasoned that where it can be shown that a man acted under a compulsion which deprived him of his "free will," such an individual would not be held responsible for his act. This, in essence, is the thinking that lies behind the formulation of the criminal duress doctrine.

....

If "duress" was to excuse, it had to be shown that the compulsion was in its nature such as would induce a well grounded apprehension of death or serious bodily harm. The compulsion had to arise without the negligence or fault of the person claiming aid from the doctrine, and the compulsion had to be instant, present, imminent and impending. The force

complained of by the victim must have lasted during the whole time required for the performance of the criminal act. The "duressed" had to show resistance to the point of death (or at least to the instant of serious and grievous bodily harm) before he capitulated and acted. The force had to be exerted, if not on the victim, then on someone close to the victim, such as a wife or child. The "duressed" had to avail himself of any opportunity to avoid or escape from the force. . . .

There was good reason for the profusion of standards. The doctrine held within it the germs of potential disorder. The business of excusing individuals from crimes which, in the last analysis, they had committed bodily, was a difficult and dangerous affair. Who could see or wisely guess at the presence of a will which freely motivated the body in that dreadful moment of criminal action? Inference, not observation, was the species of proof, and inferences, it was thought, required the aid of standards. If the doctrine was not to be the plaything of the shrewd and unscrupulous (and were not those suspected of crimes already questionable in that respect?) it had to be well hedged and strict of proof.⁶⁷

Thus, the positive law that defines where free will ends and exculpating compulsion begins is embodied in the duress doctrine and *no where else*. The rule of law embodied in the doctrine is this: A defendant's actions are deemed voluntary, even though he has been subject to compulsion, unless the compulsion is such as to induce a well-grounded apprehension of immediate and avoidable death or serious bodily harm. If a defendant

⁶⁷ Newman & Weitzer, Duress, Free Will and the Criminal Law, 30 So. Cal. L.R. 313, 313-14 (1957) (emphasis added).

fails to adduce evidence of such duress, then as a matter of law he has acted voluntarily. Only when he has adduced such evidence can there be a reasonable doubt as to his voluntariness. In short, the issue of duress *by definition* determines the issue of voluntariness: if legally sufficient duress exists, then the defendant may be acting involuntarily; if legally sufficient duress does not exist, then the defendant is deemed to be acting voluntarily as a matter of law.

My colleagues' effort to create an entirely new and separate exculpatory doctrine of "involuntariness" runs afoul of legal doctrine established for centuries and embodied in literally thousands of judicial decisions. In the instant case, the defendants failed to present evidence of legally sufficient duress, and consequently they must be deemed to have been acting voluntarily. It is clear, then, that the majority's holding that defendants' evidence should have been considered as bearing on defendants' "voluntariness," even though it may not have been sufficient to make out a duress defense lacks all legal logic, since *the issue of voluntariness has already been determined through application of the duress doctrine.*

The practical effect of the majority's decision is to abolish the strict standards governing claims of "involuntariness" that were formerly embodied in the affirmative defense of duress and to replace them with a nebulous and essentially deterministic view of "voluntariness," or free will.⁸⁸ What really takes shape is a "totality of

⁸⁸ I think this will be clear if we take a hypothetical situation and dispose of it first under traditional principles and then under the majority's approach.

Suppose that a particular prisoner leaves prison without permission. When apprehended the prisoner claims that he left prison because the food served in prison was unwholesome, and also because immediately before his flight he had

been beaten up by a prison guard. How would this case be tried under traditional principles?

The prosecution, of course, has the burden of production and the burden of persuasion with respect to every element of a criminal offense. Thus, in presenting his case in chief the prosecutor would be required to present evidence that the defendant had been in lawful custody and without permission had departed from that custody. There would be at least initially a presumption that the defendant intended the consequences of his actions and a presumption that he acted voluntarily. At this point, it would be up to the defendant to present a defense. A defendant has the burden of production concerning affirmative defenses and must start off matters by putting in some evidence in support of his defense. In federal court, once the defendant has introduced some evidence of the defense, he does not have the burden of persuasion regarding that defense. Rather, the prosecution must persuade the factfinder beyond a reasonable doubt that the defense does not exist. The defendant in this hypothetical situation could present one of two kinds of defenses. He could attempt to present evidence that would negate his state of mind, *e.g.*, an intoxication defense, or he could present evidence that would negate his "voluntariness." In this hypothetical case, the defendant adopts the latter course; he produces evidence that the food in the prison was bad and that he had been beaten before his flight. At this point the court would rule that the evidence as to the quality of food in the prison was irrelevant because it did not tend to show any imminent threat of death or severe bodily injury confronting the defendant. Assuming the defendant is being tried under a *non*-continuing offense type statute, however, evidence as to the beating may be relevant to the defense of duress and therefore may be considered by the jury.

Once evidence has been introduced raising the issue of possible duress, the federal prosecutor has the burden of persuading the jury that there was not sufficient duress to warrant escape and he must do so beyond a reasonable doubt. However, the nature of his task is clearly defined by the elements of the defense itself. He must prove to the jury that there was no imminent threat of death or serious bodily injury and that whatever threat did exist could be remedied by resort to prison grievance procedures or to the courts. When the case is presented to the jury, the jury will be precisely

the circumstances" test similar to that used in Fourth and Fifth Amendment cases concerning voluntariness. Defendant would be able to adduce any and all evidence that may have some kind of bearing on his motivation. Evidence as to every conceivable unpleasantness that may exist in the prison may be thrown into the hodge-podge. Moreover, presumably evidence concerning motivation

instructed as to the significance of the evidence presented by the defendant. It will be told that it should find the defendant not guilty if it has a reasonable doubt as to whether the defendant's flight was prompted by compulsion or duress. The strict standards governing the duress defense will be laid before the jury in the instructions. The jury will be instructed that in order to constitute a defense, the duress must be present, imminent, and impending, and of such nature as to induce a well-grounded apprehension of death or serious bodily injury if the escape is not effected. If the jury has any reasonable doubt that the defendant left prison without such duress, then it must find the defendant not guilty.

Under the majority's approach, the task of the prosecutor and the jury will be much more difficult, if not impossible. Both the evidence concerning the quality of food and the evidence concerning the beating would be admitted into evidence. These circumstances would be said to have a bearing somehow on the defendant's "voluntariness." The prosecutor has the burden of proof of establishing each and every element of the crime beyond a reasonable doubt, and therefore, he must prove "voluntariness." But under the majority's approach how is he to challenge this evidence and reconfirm the defendant's voluntariness? And how is the jury to determine whether or not these items of evidence raise "reasonable doubt" as to the defendant's "voluntariness"? The prosecutor's task under the traditional approach was clear-cut. All he had to do was disprove beyond a reasonable doubt the existence of certain *specific elements*. Moreover, the jury under the traditional approach was instructed precisely as to how it should assess evidence of duress. Under the majority's approach the jury is presumably instructed that evidence of duress somehow bears upon, or raises questions concerning, the defendant's voluntariness, but no standards are provided by which the jury can make this determination.

stemming from conditions external to the prison could be adduced by the defendant, *i.e.*, that he was driven by a desire to see his dying mother. Confronted with this unstructured evidence the jury would then be expected to find whether from all the circumstances there is any reasonable doubt as to whether the defendant acted voluntarily. This deterministic approach is a prescription for chaos and has wisely been rejected in the criminal law for hundreds of years.

V. THE MAJORITY'S "INTENT" THEORY

The majority contends that the trial court did not properly instruct the jury on the "intent" element required under 18 U.S.C. § 751 and that defendants' evidence regarding fires, assaults, and medical care was relevant to the "intent" element actually required by that statute. Therefore, it holds that the trial court erred in failing properly to submit the evidence to the jury on the issue of intent.⁹ In order to determine whether the trial court acted properly in this respect, it is necessary to determine, first, the precise nature of the "intent" element required under 18 U.S.C. § 751, and, second, whether defendants' evidence was actually relevant to this element.

⁹ It is to be noted, however, that the trial Court did not exclude defendants' evidence; the evidence was presented to the jury. Moreover, the court did instruct the jury that it "should consider *all the circumstances in evidence* that you deem relevant" to the intent issue. (Tr. 800). Thus, if the trial court did err—and I do not think it did—it was in failing to amplify for the jury the relevancy of defendants' evidence to the intent element of escape. If anything, however, this "omission" was fortunate for defendants, since, as my discussion in this section demonstrates, defendants' evidence regarding fires, assaults, and medical inattention was *irrelevant* to the issue of intent.

A. *Escape at Common Law*

At common law the crime of escape is simply the unauthorized departure of a prisoner from legal custody before his lawful discharge.⁷⁰ According to Wharton:

An escape is committed whenever by any unlawful means a criminal in lawful custody voluntarily leaves and gains his liberty before he is delivered in the due course of the law.⁷¹

The *actus reus* of the offense is the mere unauthorized physical departure from the place of confinement.⁷² The *mens rea* of the crime is a general one. No special statute of mind is required for guilt other than *the intent to go beyond permitted limits*.⁷³ The offense has been referred to as a "general intent" crime. In this context, intent means simply that the actor has the purpose of doing the very act he is performing, that is, that he is not acting inadvertently or accidentally, and that he is aware of the circumstances that make his act wrongful.

This "general intent" requirement can be illustrated as follows: If a prisoner *mistakenly* believes he has been authorized to leave prison and acts on this belief, he has not committed the crime of escape because he has not intended to leave the prison without authority. Similarly, if a prisoner is taking his evening constitutional in the prison exercise yard and, in the dark, *accidentally* walks

⁷⁰ 1 Burdick, Law of Crime 458-471. Technically, at early common law there were two related offenses—"escape" and "breach of prison." Escape was the unlawful departure of a prisoner without an act of force. Breach of prison was departure through an act of force. The term "escape" now generally covers both offenses.

⁷¹ 3 Wharton's Criminal Law and Procedure § 1367 at 758 (1957).

⁷² Perkins at 502; 1 Burdick, Law of Crime 462-63.

⁷³ Perkins at 502-03; 1 Burdick, Law of Crime 467; 3 Wharton's Criminal Law and Procedure 764.

out a prison gate, he has not formed the requisite intent for the offense. However, if a prisoner knows that he has no authority to leave prison and, *whatever his motivation*, still departs prison, *with the purpose of departing*, he has acted with the requisite intent. Thus, for example, if a prisoner leaves prison to visit his dying mother with the intent to return to prison, he has nevertheless "intended" to depart prison and he is therefore guilty of escape; it was still his purpose to avoid confinement, if only for a brief time. Similarly, if a prisoner is forced to leave prison at gunpoint, his "intent" is not negated.⁷⁴ *It was still his purpose to depart from custody; he may not have desired to leave, but he still intended to.*

This "general intent" requirement in escape cases has been variously expressed. It has been referred to as the "intent to go beyond permitted limits"⁷⁵ and "the intent to evade the due course of justice".⁷⁶ Wharton writes:

The ordinary intent required to constitute the offense of escape . . . is the intent to do an act voluntarily which results in the unlawful liberation from lawful custody.⁷⁷

Burdick writes:

. . . [A] specific intent is not required, in the absence of any statutory provision to the contrary. The voluntary act of leaving lawful custody, without permission of law, is sufficient to constitute the general criminal intent required in all crimes.⁷⁸

However expressed, this general intent requirement must be distinguished from the concept of "specific intent."

⁷⁴ Lafave & Scott §§ 49-50.

⁷⁵ Perkins at 502.

⁷⁶ *People v. Weiseman*, 280 N.Y. 385, 21 N.E.2d 362 (1939).

⁷⁷ 3 Wharton's Criminal Law and Procedure at § 764.

⁷⁸ 1 Burdick, Law of Crime at § 467.

"Specific intent" requires a showing that the defendant had an *ultimate* purpose or motive in performing the wrongful act. An actor has specific intent if he has the design to accomplish some particular aim or object by engaging in criminal conduct." If the crime of escape were a "specific intent" crime, rather than a "general intent" crime, a prisoner would not be guilty of escape unless it could be demonstrated that he had some *ultimate* purpose in mind *beyond* mere departure. Thus, for example, escape could conceivably be defined as a specific intent offense requiring an intent to avoid con-

¹⁹ *United States v. Cullen*, 454 F.2d 386, 391-92 (7th Cir. 1971). See 1 Burdick, Law of Crime § 120; Lafave & Scott at 202; Dangel, Criminal Law, § 55 (1951); Perkins at 750-51, 762-64:

Some crimes require a specified intention in addition to the intentional doing of the *actus reus* itself,—an intent specifically required for guilt of the particular offense, as in larceny, burglary, assault with intent to commit murder, using the mails with intent to defraud, or criminal attempt. The physical part of the crime of larceny, for example, is the trespassory taking and carrying away of the personal goods of another, but this may be done intentionally, deliberately, and with full knowledge of all the facts and complete understanding of the wrongfulness of the act, without constituting larceny. If this wilful misuse of another's property is done with the intention of returning it (with no change of mind in this regard) the special mens-rea requirement of larceny is lacking. Such a wrongdoer is answerable in a civil suit, and may be guilty of some statutory offense such as operating a motor vehicle without the consent of the owner, but for guilt of common-law larceny he must not only intentionally take the other's property by trespass and carry it away,—he must do this with an additional design in mind known as the *animus furandi* or intent to steal. Burglary, moreover, cannot be defined as "intentionally breaking and entering the dwelling of another in the nighttime," because this may be done without committing this felony. For common-law burglary there is required not only the intentional breaking and entering of the

finement *permanently*. In that case a prisoner would not be guilty of escape unless it could be proven that when he left prison he intended *never* to return. *The fact of the matter is, however, that escape at common law has never been deemed a specific intent crime; it has always been considered a general intent crime.*²⁰

B. Escape Under 18 U.S.C. § 751

The crime of escape is now largely governed by statute in the United States. The relevant federal statute is 18 U.S.C. § 751 which proscribes "escape from the custody of the Attorney General." The statute does not define the *actus reus* or *mens rea* of the crime beyond the words "escape from custody." The question therefore arises whether this statutory provision is essentially declaratory of the common law or whether it expands on the common law, incorporating new elements.

It is clear from the statutory language itself and from the precedents that 18 U.S.C. § 751 carries over the common law elements of escape both as to the *actus reus* and the *mens rea*.

The statute uses only the word "escape" in defining the proscribed action. It does not further define this term. There are no adjectives modifying it, and there is

dwelling house of another in the nighttime, but also an additional purpose—which is to commit a felony (or petty larceny). This additional requirement is a "specific intent," an additional intent specifically required for guilt of the particular offense.

Id. at 762 (footnotes omitted).

²⁰ The majority relies heavily on the authority of Model Penal Code drafts. Maj. Op. at 17-20. It is significant, then, that the Code's definition of the crime of escape conforms to that of a general intent type crime, "follow[ing] the prevailing law." See AMERICAN LAW INSTITUTE, MODEL PENAL CODE § 208.33 (Escape from Official Detention) at 133 (Tent. Draft No. 8, 1958).

no legislative history on its meaning. It is a basic canon of statutory construction that where an undefined term is used in a statute, it must be construed in light of its common law meaning, in the absence of evidence indicating a contrary meaning;⁸¹ this is especially true in interpreting criminal statutes.⁸² Where Congress borrows a term of art in which is accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the meaning its use conveys to the judicial mind, and in such a case, in the absence of a contrary direction, its use may be taken as satisfaction with widely accepted definitions and not a departure from them.⁸³ Accordingly, it is clear as a matter of statutory construction, that *by defining an offense solely by reference to the word "escape", Congress intended to carry over the common law elements of the crime. Thus, escape under 18 U.S.C. § 751 must be deemed a "general intent" rather than a "specific intent" offense.*

This conclusion is supported by the clear weight of authority. A series of court of appeals cases has either explicitly or tacitly treated escape under § 751 as a "general intent" crime.⁸⁴ The majority cites the Seventh

⁸¹ *E.g. United States v. Zimmerman*, 71 F. Supp. 534 (E.D. Pa. 1947). See generally, 2A Sutherland Statutory Construction § 50.03 (4th ed. 1973).

⁸² *E.g. Levinson v. United States*, 47 F.2d 470 (6th Cir. 1931); *Simmons v. United States*, 120 F. Supp. 641 (M.D. Pa. 1954).

⁸³ *Morrisette v. United States*, 342 U.S. 246 (1952).

⁸⁴ *United States v. Woodring*, 464 F.2d 1248 (10th Cir. 1972). See *United States v. McCray*, 468 F.2d 446 (10th Cir. 1972) ("The elements of the offense are (1) escape (2) from the custody of an institution where he is confined by direction of the Attorney General (3) pursuant to process issued under the laws of the United States by a court."); *United States v. Chapman*, 455 F.2d 746 (5th Cir. 1972); *Bayless v. United States*, 381 F.2d 67 (9th Cir. 1967).

Circuit case of *United States v. Nix*⁸⁵ as sole support for the proposition that escape is a "specific intent" crime; however, analysis of the *Nix* decision demonstrates that it *does not* support the majority's position. The *Nix* case focused on the ongoing controversy concerning the availability of the intoxication defense. Under one view the intoxication defense is available only with respect to "specific intent" crimes. The modern and ascendant view, however, is that intoxication may serve as a defense to "general intent" crimes as well.⁸⁶ In the *Nix* case there were two defendants—Nix and Peterson: Nix was charged with "attempted escape"; Peterson was charged with "escape." Each claimed that they were intoxicated at the time of their offenses. Since *all attempt crimes require "specific intent,"* Nix claimed that he was entitled to an intoxication instruction. Peterson argued that the crime of "escape" should also be considered a "specific intent" crime so that he, too, would be entitled to an intoxication instruction. The court acknowledged that there was scarce authority for Peterson's "specific intent" argument, but held that the intoxication was available as a defense for both escape and attempted escape regardless of the specific or general nature of the intent element required for those crimes. It stated that there was *some* intent element required in escape cases and defined it as "the intent to avoid confinement." The court then stated: "*Whatever* label is placed on this intent, a defendant under § 751 is entitled to an instruction that includes this mental component as an element of the crime If the defendant offers evidence that he was intoxicated at the time of the offense, the jury must be instructed to consider whether he was so intoxicated he could not form an intent to escape."⁸⁷ In essence, then,

⁸⁵ 501 F.2d 516 (7th Cir. 1974).

⁸⁶ *Lafave & Scott* § 45 at 343-344.

⁸⁷ 501 F.2d at 519.

the *Nix* court simply held that intoxication should be a defense to escape regardless of whether escape is a general or specific intent crime.⁸⁸

In the course of its decision the *Nix* court defined the intent element of escape as the "intent to avoid confinement." On its face, this seems to be a *general* intent requirement. As already noted the common-law/general intent requirement for escape has usually been defined as the intent to depart from custody, the intent to go beyond permitted limits, or the intent to evade the due course of justice—the "due course of justice" being continued and uninterrupted confinement. The words "avoid confinement" seems to correspond completely with these definitions. There is nothing in this definition that suggests that an escapee must act with any ultimate motive or object in leaving confinement; on its face; it *does not* require an intent to avoid confinement *permanently*. In

⁸⁸ Circuit Judge Pell's dissenting opinion in *Nix* clarifies the focus of that case as centering on the availability of the intoxication defense rather than on whether escape is a general or specific intent offense. He states:

The only close aspect that I find in this case is that part of the court's instructions to the effect that if the defendant acted or failed to act because of intoxication it was not a defense. I do not quarrel, nor do I understand that the majority does, with the immediately preceding statement in the charge that the crime does not involve specific intent. I would accept the majority standard that escape is a voluntary departure from custody with an intent to avoid confinement.

Looking at the record in the light of this standard I am convinced that *Nix* had a fair trial and that the jury found him guilty under instructions, which with the one questionable exception, properly were applicable under the standard stated in the majority opinion. While the reference to intoxication not being a defense might be prejudicially erroneous in some conceivable factual situations, I do not deem it so here.

501 F.2d at 520.

short, the definition provided by the *Nix* decision of the mental element required in escape cases is no different from the traditional general intent to go beyond permitted limits.⁸⁹

In sum, then, it is evident from the statutory language itself and from the precedents that escape from custody under 18 U.S.C. § 751 is a general intent crime. No federal court has held it to be a specific intent offense, in the sense of requiring that an escapee have an ultimate purpose beyond departure from confinement.

C. *The Relevance of Defendants' Evidence to the Intent Issue*

It remains to be determined whether defendants' evidence concerning fires, assaults, and medical care was relevant to the issue of intent.

⁸⁹ There is some language in *Nix* suggesting a "specific intent" requirement. This is treated at pp. 48-49, *infra*. It is important to note that the *Nix* court makes no effort to distinguish among certain fundamental concepts in criminal law. For example, it states: "[a] prisoner who has *no intent* to escape—because he is grossly intoxicated, or thinks his jailer has told him to leave, or mistakes the boundaries of his confinement, or has a gun held to his head by another inmate—is not likely to endanger society, *as a willful* escapee is." 510 F.2d at 519 (emphasis added). This statement, quoted approvingly by the majority, evinces confusion between those defenses which negate intent (*viz.* intoxication and mistake of fact) and those which do not negate intent but rather raise exculpatory circumstances such as the impairment of "free will" (*viz.* duress). While this dissent identifies and defines the various concepts necessary for an intelligible definition of escape, such as intent, voluntariness, duress, volition, intent-negating defenses, and defenses of excuse or justification, the majority does not even seem to be conscious that these distinctions exist, and it is this confusion that has led the majority to do such violence to the duress doctrine and the concept of intent and "free will."

If one thing is clear under the duress doctrine it is this: *compulsion does not negate general intent.*⁹⁰ As already discussed in Part III of this dissent, there are two types of defenses in criminal law. One type negates the elements of the crime; for example, the intoxication defense is designed to negate the *mens rea* or intent element of an offense. The other type of defense negates criminal responsibility by raising some matter that justifies or excuses a technical violation of the law. Compulsion, duress, and necessity are defenses of this latter type. *The rationale for these defenses is not that the defendant, confronted with an unnerving threat of harm, does not "intend" to do what he does, but rather that, when his free will was impinged upon, he made the most socially useful choice between two evils.*⁹¹ Rather than go to issue of intent, the doctrine of compulsion or duress goes to the issue of voluntariness and reflects a policy decision as to the point or stage up to which an individual under compulsion should be expected to resist pressure and act according to his own will rather than submit to the will of another. This policy decision involves consideration of the social utility of the individual's actions. As already pointed out, if A forces B at gunpoint to hit C, B is innocent of battery. He is innocent *not* because he was without the requisite intent—he *did intend to hit C*—but rather because he made the best choice under the circumstances.⁹²

⁹⁰ Lafave & Scott §§ 49-50.

⁹¹ *Id.*

⁹² The majority contends that the duress-necessity defenses reflect "two different general principles of exculpation." Maj. Op. at 17. One of these principles, according to the majority, relates to "justification by choice of the lesser evil"; but the other principle, "exemplified by the notion of duress as compulsion, dictates that a person will not be held responsible for an offense he commits under threats or conditions that a person of ordinary firmness would have been unable to resist."

Since the crime of escape under 18 U.S.C. § 751 requires only a "general intent", namely the intent to depart from custody, it is clear that defendants' evidence regarding fires, assaults, and medical care was not relevant to the "intent" issue. Even assuming for the purpose of argument that defendants' evidence established overwhelming compulsion—the threat of imminent death—still, this would not negate defendants' intent. There is no doubt that defendants consciously and deliberately departed from prison and that they were aware of the nature of their actions. They freely admit this, and this is all that is required to establish the "intent" element required under 18 U.S.C. § 751. Accordingly, the trial court's instructions on the intent issue were entirely correct.

The majority asserts that this latter principle "like the defenses of intoxication, insanity, and mistake, negates the intent or voluntariness elements of an offense." Maj. Op. at 16-19. This assertion is simply wrong. Duress does not negate general intent. The *only* authority cited by the majority in support of its assertion is the *table of contents* of the draft Model Penal Code where the duress defense is covered under "Article 2: General Principles of Liability" while the necessity defense is treated under "Article 3: General Principles of Justification." This is not authority at all; and, indeed, nowhere in the Commentary accompanying the Code's section on duress is it suggested that compulsion exculpates through the negation of intent. As already indicated in parts III and IV of this dissent, the doctrine of duress or compulsion goes to the issue of voluntariness rather than the issue of intent.

The fallacy of the majority's position can be easily demonstrated by contrasting two situations. In the first situation, C holds a gun to A's head and commands A to hit B. A does hit B. In the second situation, C holds a gun to A's head and commands A to kill B. A does kill B. A would most likely be excused for hitting B in the first situation but probably *would not* be excused for killing B in the second situation. If the majority's view that duress negates general intent is sound, how could these different results be explained. Clearly, if the compulsion in the first instance was sufficient to cancel A's

The majority's treatment of this issue is obscure. Adopting the *Nix* court's definition of escape, it holds that the intent element of the offense consists in the "intent to avoid confinement". It then concludes that "a jury can consider whether evidence of jail conditions, threats, and violence such as presented by appellants in the District Court raises reasonable doubts concerning a defendant's . . . intent to avoid confinement."²³

The majority's use of the phrase "intent to avoid confinement" is somewhat ambiguous. On its face, it seems to mean nothing more than the intent to depart from prison or the intent to go beyond permitted limits; it does not appear to require any ultimate purpose of objective beyond departure from custody. If this reading is correct, then the phrase is consistent with traditional formulations of the intent element required in escape cases and calls only for a "general intent." If this is what the majority means by the phrase, then plainly it is dead wrong in its assertion that evidence of compulsion is relevant to such intent in view of the elementary precept that compulsion does not negate general intent.

However, there are indications that the majority is investing the phrase with more meaning than is apparent on its face. It seizes upon and emphasizes the *Nix* court's statement that "most courts, confronted with evidence that a defendant could not or did not form an intent to leave *and not return*, have held such an intent essential to proof of the crime of escape."²⁴ This suggests that the majority is equating an "intent to avoid confinement" with an "intent to leave and not to return"; in other words, by the phrase "intent to avoid confinement" the majority may really mean "intent to avoid confinement

general intent, why would not the same degree of compulsion be sufficient in the second instance?

²³ Maj. op. at 10.

²⁴ Maj. op. at 7, citing *United States v. Nix*, 501 F.2d at 518.

permanently." Indeed, this is the position urged by defendants in the trial court and on appeal. Under this reading, a prisoner could *only* be held guilty of escape if it could be proved that, at the time he left prison, he *never* intended to return again. However, the majority denies, though somewhat feebly, that it is adopting this definition of the intent element. It acknowledges that "[d]escribing the requisite intent for escape as an 'intent to leave and not to return' is not completely satisfactory since it might not cover a prisoner who intends to take an unauthorized temporary leave of absence."²⁵

²⁵ Maj. Op. at 7-8 n.13. It is well that the majority has rejected the defendant's contention that the intent element of escape under 18 U.S.C. § 751 is the "intent to avoid confinement *permanently*." Such a requirement would clearly be contrary to the common law and unsupported by either the statutory language of 18 U.S.C. § 751 or by the case law interpreting that section. The only conceivable authority for defendants' position is the careless and inaccurate statement in the *Nix* case suggesting that "most courts" have found that an "intent to leave and not return" is "essential to proof of the crime of escape." The *Nix* court cites four cases in support of this statement: *Gallegas v. People*, 411 P.2d 956 (Colo. 1966); *People v. Dolatowski*, 237 N.E.2d 553 (Ill. 1968); *Chandler v. United States*, 378 F.2d 906 (9th Cir. 1967); and *Mills v. United States*, 193 F.2d 174 (5th Cir. 1951), *cert. denied*, 343 U.S. 969 (1952). In point of fact, *none* of these cases hold, or even suggest, that a specific intent not to return to prison is part of the intent element of escape. I have found no court, state or federal, that holds that a specific intent not to return is an element of escape. Of course, the most condemning feature of the defendants' position is that it is patently absurd. Even the majority grudgingly recognizes this. Under the defendants' approach a prisoner would be entitled to take a "temporary" leave of absence from prison whenever he desired. As long as he ultimately intended to return he would not be violating the law. It takes little imagination to see what this would do to 18 U.S.C. § 751. Thus, for example, if a young inmate decided that he did not want to waste his youth serving a 20-year prison sentence, he could lawfully

The majority has conjured up a wholly novel definition of the intent element of escape, however. Still fastening on the *Nix* court's phrase "intent to avoid confinement," the majority asserts that the intent required under 18 U.S.C. § 751 is *neither* the general intent to go beyond permitted limits, reflected in the trial court's instructions, *nor* the specific intent to avoid confinement permanently, urged by defendants. Rather, according to the majority, the intent element of escape is defined by reference to the nature of prison conditions:

"The word 'confinement' describes the most common form of punishment prescribed by our legal system. Jurors are readily aware that a person serving a sentence for a crime is 'confined'—i.e., his liberty is restricted—in certain fundamental ways. For example, he cannot leave the institution wherein he is confined, he cannot come and go as he pleases, his daily schedule is subject to various controls, his privacy is substantially curtailed, and he is subject to strict discipline. One who leaves custody without permission to see his mother who is ill or to improve his menu (assuming the prison fare is within reason) has an intent to avoid confinement since restricted contact with relatives and a reasonably limited choice of diet are normal incidents of confinement. Furthermore, a prisoner who leaves custody to take even a temporary 'leave of absence' from the normal conditions of confinement possesses the requisite intent for escape. On the other hand, if a prisoner offers evidence to show that he left confinement only to avoid conditions that are not normal aspects of 'confinement'—such as beatings in reprisal for testimony in a trial, failure to provide essential medical care, or homosexual attacks—the intent element of the crime of escape may not be satisfied. When a defendant introduces evidence that

leave prison as long as he intended to return at the age of 65 to serve out his term. Clearly, this notion of escape is fanciful.

he was subject to such "non-confinement" conditions, the crucial factual determination on the intent issue is thus whether the defendant left custody only to avoid these conditions or whether, in addition, the defendant *also* intended to avoid confinement. In making this determination the jury is to be guided by the trial court's instructions pointing out those factors that are most indicative of the presence or absence of an intent to avoid confinement."⁹⁰

Thus, under the majority's approach, in order to determine whether a particular defendant has satisfied the intent element under 18 U.S.C. § 751, three inquiries must be made. First, what condition or factor prompted the defendant to depart from custody? Second, was this condition a "normal incident of confinement"? And, third, was the defendant's departure prompted "only" by this factor or condition? Apparently, the majority believes that if a defendant's departure from prison is prompted solely by "non-confinement conditions", that he has not "intended" to escape from prison. In short, the majority holds that the intent required under 18 U.S.C. § 751 is the *specific intent* to depart from "confinement conditions," rather than from "non-confinement conditions."

As strained as the majority's approach is, it is understandable. My colleagues are apparently prepared to labor mightily to exculpate these defendants. They have come to realize that the defendants' flimsy duress defense does not pass muster under traditional standards. Undeterred however, they have looked about for some other avenue for raising the "duress issues"; for some reason, they have decided to work under the rubric of "intent." Here, however, they have run up against the simple fact that escape is a general intent crime and the fundamental principle that duress or compulsion does not negate general intent. The problem remains: How does one make

⁹⁰ Maj. Op. at 8-9 n. 17.

issues of duress relevant to intent? My colleagues have now found a way to solve this problem; they contrive to redefine the intent element of escape by direct reference to duress. Various prison conditions, which *might* have given rise to a duress defense *once the escapee had returned to custody*, are now identified by my colleagues as "non-confinement conditions." And other prison conditions, which would not have given rise to a duress defense, are termed "confinement conditions." If a prisoner's departure from prison is prompted by duress-inducing conditions, he has *not* "intended" to escape. If a prisoner's departure is prompted by other conditions, however, he *has* "intended" to escape. *Voila!* Matters of duress are now directly relevant to the issue of intent. Modestly, the majority relegates this legerdemain to a footnote.

There are several problems with the majority's approach. The most serious one is that it has no foundation in the law.

First, it is clearly contrary to the common law. It has *never* been an element of escape at common law that an escapee have a specific intent to avoid "the normal incidents of confinement"; all that is required is an intent to go beyond permitted physical limits, and this is a general intent requirement.

Second, it is directly in conflict with innumerable cases holding that prison conditions, no matter how rank and intolerable, do not affect liability for escape.⁹⁷

Third, there is absolutely nothing in 18 U.S.C. § 751 that suggests adoption of this novel element. The statute uses only the word "escape" to define the offense, and, in

⁹⁷ *E.g.*, *State v. Davis*, 14 Nev. 439 (1880); *Hinkle v. Commonwealth*, 66 S.W. 816 (Ky. 1902).

the absence of a contrary indication, that term must be construed according to its common law meaning.

Fourth, there is *no* case law holding that a specific intent to avoid "the normal incidents of confinement" is an element of escape under 18 U.S.C. § 751. I invite the majority to cite one authority, state or federal, that even hints at this position.

Fifth, the majority's position is conceptually unsound. Even if the distinction between "confinement conditions" and "non-confinement conditions" is valid, it is incorrect to say that a defendant does not *intend* to avoid confinement conditions simply because his immediate purpose is to avoid non-confinement conditions. A defendant "intends" what he knows to be the necessary consequences of his actions. Thus, even though a prisoner's primary or sole purpose is to avoid "non-confinement conditions," he can only do so—and he knows he can only do so—by avoiding legitimate confinement conditions as well. When and if he leaves prison, this prisoner "intends" to depart from "confinement conditions" even though his *motive* is to avoid non-confinement conditions. The majority unfortunately confounds "motive" with "intent."

There is also a practical problem inherent in the majority's approach. In order to ascertain the "intent" of the defendant—his *subjective* state of mind—the majority's decision necessitates embroiling the fact-finder in an inquiry into the boundaries between normal prison conditions and abnormal prison conditions. I submit this inquiry is irrelevant to the issue of intent. The severity of prison conditions is *relevant* to the issue whether the defendant has been subject to duress or compulsion, and in this context the question is not whether a particular condition is or is not a "normal" incident of prison life, but, rather, is whether the condition is such as to raise

in the defendant's mind a well-grounded apprehension of serious bodily injury or death.

In sum, then, it is indisputable that escape under 18 U.S.C. § 751 is a general intent crime. It is also clear that evidence of compulsion, while perhaps relevant to an affirmative defense of duress or necessity, does not negate *general* intent. If the majority insists that escape is a specific intent crime, I submit this is totally without support in legal precedent and the inescapable practical results are a demonstrable absurdity. Consequently, the majority's theory that evidence of duress, though insufficient to make out a duress defense, should nevertheless be presented to the fact finder as relevant to the defendants' intent is simply wrong.

On analysis, then, my view of the majority position is this:

1. The defense of duress cannot be validly asserted by these defendants, because (a) there was never any attempt by defendants to turn themselves in to appropriate authorities, and further, (b) such evidence as was offered by defendants was insufficient as a matter of law to make out a duress defense since it fails every previous legal test with respect to the severity and immediacy of the "compulsion."

2. Apparently realizing the weakness of defendant's position under any accepted standard of duress, the majority attempts to construct a new haven for escaped criminals under the rubric of "voluntariness." This likewise fails, because the law has always been that the proper avenue for approaching issues of "voluntariness", or "free will", is through the affirmative defense of duress in cases such as this in which defendants claim that they were deprived of free will by force of circumstances or the threats of other persons. The doctrine of duress was created specifically to deal with such issues.

3. Finally, the only meaningful way in which the majority's discussion of intent can be interpreted—and the only construction which could conceivably assist defendants here—is that the majority imposes a specific intent requirement on the crime of escape, and includes therein an intent to avoid "the normal incidents of confinement." However, such a requirement has never before been found in the federal courts; its practical application would make a mockery out of the federal escape statute. The majority's theoretical edifice in this opinion is not only unprecedented: it is unworkable.

I respectfully dissent.

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APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1977

Criminal 76-735

[Filed July 12, 1978, United States Court of Appeals
for the District of Columbia Circuit,
George A. Fisher, Clerk]

No. 77-1404

UNITED STATES OF AMERICA

v.

CLIFFORD BAILEY, APPELLANT

77-1413

UNITED STATES OF AMERICA

v.

RONALD CLIFTON COOLEY, APPELLANT

77-1502

UNITED STATES OF AMERICA

v.

RALPH WALKER, APPELLANT

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

94a

Before: WRIGHT, Chief Judge, and MCGOWAN and
WILKEY, Circuit Judges

JUDGMENT

These causes came on to be heard on a record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court, that the judgments of the District Court appealed from herein are hereby reversed and the cases are remanded to the District Court for new trials and other action, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: July 12, 1978

Opinion for the Court filed by Chief Judge Wright.

Dissenting opinion filed by Circuit Judge Wilkey.

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APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 19

Criminal No. 76-735

[Filed July 14, 1978, United States Court of Appeals
for the District of Columbia Circuit,
George A. Fisher, Clerk]

No. 77-1404

UNITED STATES OF AMERICA

v.

CLIFFORD BAILEY, APPELLANT

No. 77-1413

UNITED STATES OF AMERICA

v.

RONALD CLIFTON COOLEY, APPELLANT

No. 77-1502

UNITED STATES OF AMERICA

v.

RALPH WALKER, APPELLANT

Before: WRIGHT, Chief Judge.

ORDER

It is ORDERED by the court, *sua sponte*, that the opinion for the court in the above cases filed July 12, 1978 is hereby amended so that on page 15 the second and third lines of footnote 25 will read:

1977), *rev'd on other grounds*, — U.S. —, 46 U.S. L. WEEK 4840 (June 26, 1978); *United States v. Cluck*, 542 F.2d 728 (8th

Per Curiam

For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1978

[Filed Oct. 19, 1978, United States Court of Appeals
for the District of Columbia Circuit,
George A. Fisher, Clerk]

No. 77-1404

UNITED STATES OF AMERICA

v.

CLIFFORD BAILEY, APPELLANT

And Consolidated Case Nos. 77-1413 and 77-1502

Before: WRIGHT, Chief Judge; MCGOWAN and WILKEY, Circuit Judges

ORDER

Upon consideration of the petition for rehearing filed by appellee United States of America, it is

ORDERED, by the Court, that appellee's aforesaid petition is denied.

Per Curiam

For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1978

[Filed Oct. 19, 1978, United States Court of Appeals
for the District of Columbia Circuit,
George A. Fisher, Clerk]

No. 77-1404

UNITED STATES OF AMERICA

v.

CLIFFORD BAILEY, APPELLANT

And Consolidated Case Nos. 77-1413 and 77-1502

Before: WRIGHT, Chief Judge; BAZELON, MCGOWAN,
TAMM, LEVENTHAL, ROBINSON, MACKIN-
NON, ROBB, and WILKEY, Circuit Judges

ORDER

Upon consideration of the suggestion for rehearing
en banc filed by appellee United States of America,
and a majority of the judges of the Court in regular
active service not having voted in favor thereof,
it is

ORDERED, by the Court, *en banc*, that appellee's
aforesaid suggestion for rehearing *en banc* is de-
nied.

Per Curiam

For the Court:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Statement of Reasons for Voting for
Rehearing *En Banc*

TAMM, MACKINNON, ROBB, and WILKEY, *Circuit
Judges*: We think the majority opinion is in error
in both result and rationale, and agree generally
with the views set forth in the dissent as to the
proper disposition of this case.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1602

UNITED STATES OF AMERICA

v.

JAMES T. COGDELL, a/k/a JAMES T. COGWELL,
APPELLANTAppeal from the United States District Court
for the District of Columbia

(D.C. Criminal No. 76-735)

Argued December 5, 1977

Decided July 12, 1978

Dorothy Sellers (appointed by this court) for appellant.

David G. Hetzel, Assistant United States Attorney, with whom *Earl J. Silbert*, United States Attorney, and *John A. Terry* and *Steven R. Schaars*, Assistant United States Attorneys, were on the brief, for appellee. *James F. Hibey*, and *William D. Pease*,

Assistant United States Attorneys, also entered appearances for appellee.

Before WRIGHT, *Chief Judge*, and MCGOWAN and WILKEY, *Circuit Judges*.

Opinion for the court filed by *Chief Judge* WRIGHT.

Dissenting opinion filed by *Circuit Judge* WILKEY.

WRIGHT, *Chief Judge*: Appellant James Cogdell was convicted by a jury of violating 18 U.S.C. § 751 (a) (1976) by escaping from the "Northeast One" section of the new D.C. Jail on August 26, 1976, the same day as the escape of the appellants in *United States v. Bailey*, — F.2d — (D.C. Cir. No. 77-1404, decided July 12, 1978), a case we also decide today. Cogdell was originally indicted along with those other appellants, but his case was severed and tried at a later date to accommodate his attorney's schedule. Nevertheless, the trial judge relied heavily on the rulings he had made previously in the *Bailey* case when ruling on appellant's motions and developing the jury instructions.¹ For the reasons outlined in *Bailey* we hold that Cogdell's conviction must be reversed and his case remanded for a new trial because of errors in the trial court's instructions

¹ See Transcript of Proceedings, *United States v. Cogdell*, Criminal No. 76-735-3 (D. D.C. May 9, 1977) (hereinafter *Cogdell Tr. I*), at 65-78. Compare Transcript of Proceedings, *United States v. Cogdell*, Criminal No. 76-735-3 (D. D.C. May 10, 1977) (hereinafter *Cogdell Tr. II*), at 103-116 (jury instructions) with Transcript of Proceedings, *United States v. Bailey*, Criminal No. 76-735-4 (D. D.C. March 14, 1977) (hereinafter *Bailey Tr.*), at 790-807 (jury instructions). See also text and notes at notes 10-12 *infra*.

and the exclusion of relevant evidence on the "escape" element of the offense.²

Cogdell's case also raises unique issues that require additional consideration. Unlike any of the appellants in *Bailey*, Cogdell had been brought to the D.C. Jail pursuant to a writ of *habeas corpus ad prosequendum* from the Fairfax County Jail in Virginia where he had been committed following a state conviction but before sentencing.³ Cogdell's indictment reflected his special situation; he was charged with escaping from "custody under and by virtue of a commitment issued under the laws of the United

² See *United States v. Bailey*, — F.2d —, — (D.C. Cir. No. 77-1404, decided July 12, 1978) (slip op. at 4-27). Cogdell adopted the arguments of appellants Walker and Bailey on this issue. See brief for appellant at v. Relying on his ultimate conclusion in *Bailey* to exclude from the jury's consideration any evidence of threats, assaults, or conditions in the D.C. Jail, the trial judge refused even to admit such evidence in Cogdell's case. See *Cogdell Tr. I*, *supra* note 1, at 11-12. The trial court's instructions on intent and on what constitutes an "escape" were the same in both cases. Compare *Cogdell Tr. II*, *supra* note 1, at 110-111, 113, with *Bailey Tr.*, *supra* note 1, at 799-801, 802.

³ A court issues a writ of *habeas corpus ad prosequendum* when it is necessary to bring a person who is confined for some other offense before the issuing court for trial. See generally *Carbo v. United States*, 364 U.S. 611 (1961); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807). Appellant had been convicted in the Circuit Court of Fairfax County on July 21, 1976, of three counts of uttering and delivering a forged check. His sentencing on that conviction had been postponed until September 9, at his attorney's request, so that a pre-sentence report could be prepared. At the time the writ involved in this case was issued, appellant was confined in the Fairfax County Jail awaiting sentence.

States by a Judge of the Superior Court of the District of Columbia following his arrest on a charge of a felony." ⁴ On the basis of these factors peculiar

⁴ See *Cogdell Tr. II*, *supra* note 1, at 112. Appellant was also charged with violating 22 D.C. Code § 2601 (1973) (prison breach), but the jury was instructed that they need not consider this charge if they found appellant guilty of the federal offense. See *Cogdell Tr. II*, *supra* note 1, at 113.

18 U.S.C. § 751(a) (1970) provides:

Whoever escapes or attempts to escape from the custody of the Attorney General or his authorized representative, or from any institution or facility in which he is confined by direction of the Attorney General, or from any custody under or by virtue of any process issued under the laws of the United States by any court, judge, or magistrate, or from the custody of an officer or employee of the United States pursuant to lawful arrest, shall, if the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense, be fined not more than \$5,000 or imprisoned not more than five years, or both; or if the custody or confinement is for extradition or by virtue of an arrest or charge of or for a misdemeanor, and prior to conviction, be fined not more than \$1,000 or imprisoned not more than one year, or both.

(Emphasis added.) Cogdell's indictment was based on the portion of § 751 proscribing escapes "from any custody under or by virtue of any process issued under the laws of the United States by any court, judge, or magistrate," in contrast to the indictments in *Bailey*, which were based on escape from the "custody of the Attorney General." See *United States v. Bailey*, *supra* note 2, — F.2d at —, slip op. at 13. Appellant urges us to find the indictment fatally defective because it uses the term "commitment" rather than "process," and because a writ of *habeas corpus ad prosequendum* is not a commitment. Brief for appellant at 8-12. We agree with the Government, however, that the word "commitment" has a general custodial sense as well as a strict technical one, and that the words of the indictment were sufficiently clear to give ap-

to his case, Cogdell argues that the charge on which he was convicted must be dismissed. We find no error that requires dismissal and therefore remand this case, like those of the appellants in *Bailey*, for further proceedings.

I

Appellant first contends that the indictment does not state an offense under 18 U.S.C. § 751(a) (1976) because the writ of *habeas corpus ad prosequendum* issued by the Superior Court was not issued under the laws of the United States. Cogdell claims that the writ was issued under 16 D.C. Code § 1901 (1973), which he argues is not a law of the United States. See *Key v. Doyle*, — U.S. —, 46 U.S. L. WEEK 4009 (November 14, 1977). The Government does not contend that Section 1901 is a law of the United States, but responds that the writ in this case was issued under the All Writs Act, 28 U.S.C. § 1652 (1970), which is a law of the United States. The writ does not recite the statutory authority under which it was issued,⁵ but we find the

pellant notice of the proof that would be adduced against him and to protect him from double jeopardy. See *Gaither v. United States*, 413 F.2d 1061, 1066 (D.C. Cir. 1969).

⁵ Government Exhibit 1C. The writ does begin with the following salutation:

THE PRESIDENT OF THE UNITED STATES:

TO: Superintendent, Fairfax County Jail

United States Marshal for the District of Columbia

United States Marshal for the Eastern District of Virginia

GREETINGS:

* * *

Government's position more convincing than appellant's.

Section 1901 is limited by its terms to writs of *habeas corpus ad subjiciendum*—writs challenging the grounds for imprisonment of persons “committed, detained, confined, or restrained from [their] lawful liberty within the district.”⁶ The authority to issue writs of *habeas corpus ad prosequendum* cannot be read into the language of the section without severe strain. On the other hand, the literal terms of Section 1652 authorize the Superior Court, as a court “established by Act of Congress,” to issue the writ of *habeas corpus ad prosequendum* as one “in aid of [its] respective jurisdiction[] and agreeable to the usages and principles of law.” 28 U.S.C.

⁶ §16-1901. Petition; issuance of writ

(a) A person committed, detained, confined, or restrained from his lawful liberty within the District, under any color or pretense whatever, or a person in his behalf, may apply by petition to the appropriate court, or a judge thereof, for a writ of habeas corpus, to the end that the cause of the commitment, detainer, confinement, or restraint may be inquired into. The court or the judge applied to, if the facts set forth in the petition make a prima facie case, shall forthwith grant the writ, directed to the officer or other person in whose custody or keeping the party so detained is returnable forthwith before the court or judge.

(b) Petitions for writs directed to Federal officers and employees shall be filed in the United States District Court for the District of Columbia.

(c) Petitions for writs directed to any other person shall be filed in the Superior Court of the District of Columbia.

§ 1651 (1970). See *Morrow v. District of Columbia*, 417 F.2d 728 (D.C. Cir. 1969).⁷

Although Congress has recently passed legislation designed to treat the D.C. court system more like

⁷ The All Writs Act was made expressly applicable to courts "established by Act of Congress" in a 1948 revision. The Revisor's Note commented:

The revised section extends the power to issue writs in aid of jurisdiction, to all courts established by Act of Congress, thus making explicit the right to exercise powers implied from the creation of such courts.

28 U.S.C. § 1651 (1970) (Reviser's Note). The power to issue writs of *habeas corpus ad prosequendum* seems clearly within this category of implied powers.

Appellant argues that despite its literal language the All Writs Act does not grant any authority to issue writs of *habeas corpus*. He relies on the Supreme Court's analysis of *habeas corpus* and the All Writs Act in *Carbo v. United States*, *supra* note 3. The Court in *Carbo* was concerned with the jurisdiction of a federal district court to issue a writ of *habeas corpus ad prosequendum* to retrieve a prisoner outside its territorial jurisdiction and found the issue controlled by 28 U.S.C. § 2241, the specific provision giving the Supreme Court, Supreme Court Justices, circuit judges, and federal district courts the power to issue writs of *habeas corpus*, rather than by the All Writs Act. See *id.* at 621, 624 (Warren, C.J., dissenting). Unlike the All Writs Act, § 2241 does not mention courts established by Act of Congress. Although *Carbo* holds that § 2241 governs issuance of writs of *habeas corpus* by the courts and judges mentioned in that section, appellant's contention that § 2241 implicitly denies any other court or judge authority to issue the writ under the All Writs Act is contrary to other Supreme Court precedents and to the views of leading commentators. See, e.g., *United States v. Hayman*, 342 U.S. 205, 221 & n.35 (1952); *Price v. Johnson*, 334 U.S. 266, 278-286 (1948); 9 J. MOORE, FEDERAL PRACTICE ¶¶ 110.26-110.28 (2d ed. 1975).

the court system of a state,⁸ it surely did not intend to remove the local courts' power to issue writs of *habeas corpus ad prosequendum*. Since Congress has not provided for this authority in a "local" statute, we conclude that the Government was justified in claiming that the authority still exists under the All Writs Act and that the writ issued in this case was therefore issued under the laws of the United States.⁹

II

Appellant also argues that the indictment must be dismissed because of a fatal variance between the offense with which he was charged and that for which he was tried. We see no consequential variance between the indictment and the evidence. As noted

⁸ See District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 STAT. 473; *Palmore v. United States*, 411 U.S. 389, 409 (1973); *Key v. Doyle*, — U.S. —, 46 U.S. L. WEEK 4009 (Nov. 14, 1977).

⁹ Appellant also contends that his custody pursuant to the writ ended as a matter of law when the status call for which he had been brought to the Superior Court was over. See *United States v. Stead*, 528 F.2d 257 (8th Cir. 1975), *cert. denied*, 425 U.S. 953 (1976). In our opinion this argument reflects an overly restrictive view of what constitutes "custody" for purposes of the federal escape statute. See *United States v. Bailey*, *supra* note 2, — F.2d at —, slip op. at 30-34. The delay of eight days in returning Cogdell to Virginia, although not satisfactorily explained in the record, was not inordinate, and an instruction that a prisoner remains in "custody" for purposes of § 751 by virtue of a writ of *habeas corpus ad prosequendum* until he has been returned to the sending jurisdiction as provided in the writ would not be improper in this case.

above, appellant was indicted for escaping from "custody under and by virtue of a commitment [sic] issued under the laws of the United States by a Judge of the Superior Court of the District of Columbia following his arrest on a charge of a felony." The prosecution's documentary and testimonial evidence indicated that appellant had been brought from the Fairfax County Jail on August 17, 1976 pursuant to a writ of *habeas corpus ad prosequendum* to appear for a status call in the Superior Court, where he had been indicted on charges of forgery, uttering, unauthorized use of a vehicle, and carrying a pistol without a license; that he had been confined in the "Northeast One" section of the new D.C. Jail; that he had left the jail without authorization on August 26; and that he had been arrested by the FBI on September 28.¹⁰

While we see no significant variance between the indictment and the evidence, we do recognize that there were possibly prejudicial variations between the indictment and the trial court's instructions. Because of the similarity between appellant's case and *United States v. Bailey*, the trial judge developed the instructions for this case by going through the instructions he had given in the *Bailey* case and

¹⁰ See Government Exhibits 1A (face sheet), 1B (escape apprehension report), 1C (Writ of Habeas Corpus Ad Prosequendum), and 1D (Petition for Writ of Habeas Corpus Ad Prosequendum); *Cogdell Tr. I*, *supra* note 1, at 22-29 (testimony of James Harbin, Supervisor of the Records Office at the new D.C. Jail); 54-57 (testimony of FBI Agent Barry Colvert).

making the changes he thought necessary in consultation with the prosecutor and defense counsel.¹¹ The instructions resulting from this procedure failed to take sufficient account of the differences between the indictment in *Bailey* and that in this case. In particular, much language referring to the "custody of the Attorney General" was left in the instructions, in spite of the irrelevance of such language to the charge in Cogdell's indictment.¹² In its context, this superfluous language may not have been prejudicial to appellant,¹³ and appellant's coun-

¹¹ *Cogdell Tr. I*, *supra* note 1, at 65-78. See note 1 *supra*.

¹² See text and note at note 4 *supra*.

¹³ The relevant portion of the trial court's instructions reads:

I will now take up with you the indictment and the instructions which relate particularly to the indictment. You are instructed as a matter of law that an individual held within the District of Columbia, Department of Corrections, pursuant to a court order of commitment or Writ of Habeas Corpus [Ad] Prosequendum [sic] of the Superior Court of the District of Columbia is in the custody of the Attorney General of the United States.

Now, ladies and gentlemen, Mr. Cogdell, the Defendant in this case, is charged in Count One of the indictment as follows: On or about August 26, 1976, within the District of Columbia, James T. Cogdell, having been in the custody under and by virtue of a commitment issued under the laws of the United States by a Judge of the Superior Court of the District of Columbia following his arrest on a charge of a felony, did unlawfully and willfully flee and escape from such custody, which would constitute a violation of Title 18 of the United States Code, Section 751 (a). Now, the essential elements of the offense of escape from custody, each of which the Government must prove beyond

a reasonable doubt in order to justify a verdict of guilty[,] are as follows:

First, that at the time [of] the offense, that is to say August 26, 1976, the Defendant in question had been in custody pursuant to a commitment issued under the laws of the United States. On that particular date there are certain copies of pertinent court papers on that particular element.

Second, that as a result of the commitment, the Defendant was committed to the custody of the Attorney General or his designated representative, and was in custody at the time of the offense. Insofar as this element is concerned, there are records of the District of Columbia, Department of Corrections, and a certified copy of the Writ of Habeas Corpus ad Prosequendam [*sic*]. That is to say, these records have been received in evidence. You may examine them in the jury room. You have previously been instructed as to the legal significance of the commitment, the Writs of Habeas Corpus as they pertain to the custody of the Attorney General or his authorized representative.

* * *

* * * Thus, if you find that the Government has proven beyond a reasonable doubt each of the essential elements constituting the offense charged in Count One, you may find the Defendant guilty as charged.

On the other hand, if you have a reasonable doubt as to whether the Government has proved any one of these essential elements, then you must find the Defendant not guilty.

Cogdell Tr. II, supra note 1, at 111-113. These instructions indicate that the trial court added an additional element (being in the custody of the Attorney General) to the elements of the offense alleged in the indictment (escaping from custody by virtue of a commitment issued under the laws of the United States), and then instructed the jury that this additional element was met as a matter of law if the other elements were satisfied. We also note in passing for the benefit of the trial court on remand that the instructions might have given more emphasis to the requirement that the defendant must be in

sel did not object to the instructions on this ground at trial. Nevertheless, this language was a potential source of confusion to the jury, and we assume that the trial court will not give the same instruction in the new trial.

III

Appellant's final argument is based on the Interstate Agreement on Detainers (IAD), to which the District of Columbia and the United States became signatories in 1970. 24 D.C. Code § 701 (1973); Pub. L. 91-538, 84 STAT. 1397 (1970). The IAD is designed to establish a uniform process for transporting prisoners for trial from a jurisdiction in which they are serving a sentence to a jurisdiction in which they have been charged with an offense. The primary purpose of the IAD is to eliminate the abuses, such as delay in bringing prisoners to trial and interference with rehabilitation programs, which characterized the use of "detainers" previous to the adoption of the Agreement.¹⁴ The provisions of the IAD relevant to this case allow "[t]he appropriate officer of the jurisdiction in which an untried indictment, information, or complaint is pending * * *

custody "by virtue of an arrest on a charge of felony," an element contained in both the statute and the indictment.

¹⁴ See generally Note, *The Effect of the Interstate Agreement on Detainers Upon Federal Prisoner Transfer*, 46 FORDHAM L. REV. 492, 508-515 (1977); Comment, *The Detainer System and the Right to a Speedy Trial*, 31 U. CHI. L. REV. 535 (1964); Note, *Guaranty of a Speedy Trial for Convicts in Other Jurisdictions*, 77 YALE L. J. 767 (1968).

to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party State made available * * * upon presentation of a written request for temporary custody * * *." Article IV(a). The IAD also provides that once a prisoner has been transferred pursuant to its provisions, "[i]f trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment * * *, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice." Article IV(e).

Appellant urges us to treat a writ of *habeas corpus ad prosequendum* issued by the Superior Court as a "detainer" and to find that the provisions of the IAD apply to his case. He points out that before the writ involved in this case was issued he had already been brought before the Superior Court for arraignment and returned to the Fairfax County Jail. If the IAD applies, he argues (1) that his return to Virginia prior to trial rendered the charges against him in the Superior Court of no effect, and (2) that the writ bringing him before the Superior Court on August 17 was therefore a "nullity," and (3) that the writ thus cannot serve as a basis for a conviction of escape under 18 U.S.C. § 751(a).

Appellant's arguments based on the IAD are no longer tenable following the Supreme Court's recent decision in *United States v. Mauro*, — U.S. —,

46 U.S. L. WEEK 4491 (May 23, 1978). The Court in *Mauro* held that a writ of *habeas corpus ad prosequendum* issued pursuant to 28 U.S.C. § 2241 is not a "detainer" under the IAD. Although we hold that the writ in this case was issued under the All Writs Act, 28 U.S.C. § 1651, the Court's reasoning—that the IAD was not intended to apply to writs of *habeas corpus ad prosequendum* because such writs do not cause the problems created by detainers, which the IAD was meant to relieve, *United States v. Mauro*, *supra*, — U.S. at —, 46 U.S. L. WEEK at 4496-4497—applies with equal force regardless of the authority under which the writ is issued.

IV

Since we conclude that none of the arguments raised by appellant require dismissal of the charge on which he was convicted, we reverse the judgment of the District Court for the reasons stated above and remand this case for further proceedings.

Reversed and remanded.

WILKEY, *Circuit Judge, dissenting*: I respectfully dissent for the reasons set forth in my dissenting opinion in the companion case, *United States v. Bailey, et al.*, Nos. 77-1404, 77-1513, 77-1502 (D.C. Cir. 12 July 1978).

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APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1977

Criminal No. 76-735

[Filed Oct. 19, 1978, United States Court of Appeals
for the District of Columbia Circuit,
George A. Fisher, Clerk]

No. 77-1602

UNITED STATES OF AMERICA

v.

JAMES T. COGDELL, a/k/a JAMES T. COGWELL,
APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Before: WRIGHT, *Chief Judge*, and MCGOWAN and
WILKEY, Circuit Judges

JUDGMENT

This cause came on to be heard on the record on
appeal from the United States District Court for
the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and ad-
judged by this Court that the judgment of the Dis-

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trict Court appealed from in this cause is hereby
reversed and the case is remanded to the District
Court for further proceedings, in accordance with
the opinion of this Court filed herein this date.

Per Curiam

For the Court:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Dated: July 12, 1978

Opinion for the Court filed by Chief Judge Wright.

Dissenting opinion filed by Circuit Judge Wilkey.

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APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1978

[Filed Oct. 19, 1978, United States Court of Appeals
for the District of Columbia Circuit,
George A. Fisher, Clerk]

No. 77-1602

UNITED STATES OF AMERICA

v.

JAMES T. COGDELL, a/k/a JAMES T. COGWELL,
APPELLANT

Before: WRIGHT, Chief Judge; MCGOWAN and
WILKEY, Circuit Judges

ORDER

Upon consideration of the petition for rehearing,
filed by appellee United States of America, it is

ORDERED, by the Court, that appellee's afore-
said petition is denied.

Per Curiam

For the Court:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

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APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1978

[Filed Oct. 19, 1978, United States Court of Appeals
for the District of Columbia Circuit,
George A. Fisher, Clerk]

No. 77-1602

UNITED STATES OF AMERICA

v.

JAMES T. COGDELL, a/k/a JAMES T. COGWELL,
APPELLANT

Before: WRIGHT, Chief Judge; BAZELON, MCGOWAN,
TAMM, LEVENTHAL, ROBINSON, MACKINNON,
ROBB, and WILKEY, Circuit Judges

ORDER

Upon consideration of the suggestion for rehear-
ing *en banc* filed by appellee United States of Amer-
ica, and a majority of judges of the Court in regular
active service not having voted in favor thereof, it is

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ORDERED, by the Court, *en banc*, that appellee's aforesaid suggestion for rehearing *en banc* is denied.

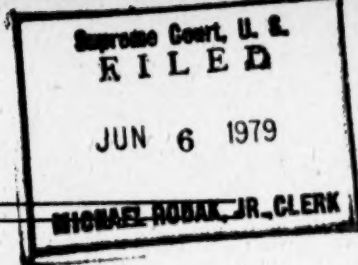
Per Curiam

For the Court:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Circuit Judges Tamm, MacKinnon, Robb, and Wilkey would grant appellee's suggestion for rehearing *en banc*.

APPENDIX



In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-990

UNITED STATES OF AMERICA,

Petitioner

—v.—

CLIFFORD BAILEY, ET AL.

1

UNITED STATES OF AMERICA,

Petitioner

—v.—

JAMES COGDELL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 18, 1978
CERTIORARI GRANTED MARCH 19, 1979

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-990

UNITED STATES OF AMERICA,

Petitioner

—v.—

CLIFFORD BAILEY, ET AL.

UNITED STATES OF AMERICA,

Petitioner

—v.—

JAMES COGDELL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Order denying Government's petition for rehearing, October 19, 1978	97a
Order denying Government's suggestion for rehearing <i>en banc</i> , October 19, 1978	98a
In <i>United States v. Cogdell</i> :	
Opinion, July 12, 1978	100a
Judgment, July 12, 1978	114a
Order denying Government's petition for rehearing, October 19, 1978	116a
Order denying Government's suggestion for rehearing <i>en banc</i> , October 19, 1978	117a

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Crim. No. 76-735

UNITED STATES OF AMERICA

v.

1. CLIFFORD BAILEY
2. RONALD CLIFTON COOLEY
3. JAMES COGDELL, a/k/a JAMES COGWELL
4. RALPH WALKER

DOCKET ENTRIES *

DATE	PROCEEDINGS
1976	
Nov 23	Defs. #1, 2, 3, 4: Indictment filed. Defs. #1, 2, 3: Defendants committed: Commitment issued. Def. #4: Bench warrant ordered and issued upon presentment of indictment.
Nov 30	Defs. #1, 2, 3, 4: Counsel appointed.
Dec 2	Defs. #1, 2, 3: Arraignment: pleas of not guilty entered; trial set for 1/10/77. Def. #4: Fugitive.
Dec 16	Def. #4: Arraigned; plea of not guilty entered; trial set for 1/10/77.
1977	
Jan 3	Def. #3: Motion of John J. Hurley to withdraw as counsel for Def. Cogdell.
Jan 5	Def. #3: Status hearing; court vacates order appointing John J. Hurley as counsel for Def. Cogdell, and appoints Albert Overby as counsel.
Jan 10	Def. #3: Motion for mental examination granted.

* Entries deemed irrelevant by the parties have been omitted.

DATE	PROCEEDINGS
1977	
Jan 12	Def. #3: Order dated 1/11/77 vacating John Hurley as counsel and appointing Albert Overby <i>nunc pro tunc</i> issued.
Jan 13	Def. #3: Def.'s motion for commitment to St. Elizabeth's Hospital for mental examination granted.
Feb 3	Def. #3: Letter from St. Elizabeth's Hospital stating Def. competent to stand trial.
Feb 23	Def. #3: Motion of Def. to dismiss indictment filed.
Feb 23	Def. #3: Motion of Def. for severance and to excuse filed.
Mar 8	Def. #3: Def.'s counsel engaged in other proceedings; case severed on court's own motion. Def. #1, 2, 4: Jury sworn; trial begins; respited until 3/9/77.
Mar 9	Def. #1, 2, 4: Trial resumed; respited until 3/10/77.
Mar 10	Def. #1, 2, 4: Trial resumed; respited until 3/11/77.
Mar 11	Def. #1, 2, 4: Trial resumed; respited until 3/14/77.
Mar 14	Def. #1, 2, 4: Trial resumed; retyped indictment. Def. proposed instruction No. 1—denied as submitted. Verdict: Guilty each Def. as indicted on Counts 1, 2 & 3; jury discharged.
Mar 21	Def. #4: Def. escaped custody while being transported to D.C. General Hospital; bench warrant ordered and issued.
Mar 23	Def. #3: Status hearing; trial set for 5/9/77.

DATE	PROCEEDINGS
1977	
Apr 7	Def. #2: Sentenced to five years' imprisonment to run consecutively to any sentence now being served, subject to the provisions of 18 U.S.C. 4205(b)(2); judgment and commitment issued.
Apr 12	Def. #1: Sentenced to five years' imprisonment to run consecutively to any sentence now being served, subject to the provisions of 18 U.S.C. 4205(b)(2); judgment and commitment issued.
Apr 14	Def. #2: Notice of Appeal filed.
Apr 20	Def. #1: Notice of Appeal filed.
May 3	Def. #3: Motion to dismiss pursuant to 18 U.S.C. 3161(c) filed by Def.
May 6	Def. #3: Motion to dismiss indictment for lack of speedy trial heard and denied.
May 9	Def. #3: Motion to dismiss indictment because of violation of 45 day rule denied; jury sworn; trial begins; respited until 5/10/77.
May 10	Def. #3: Trial resumed; guilty verdict returned for violation of 18 U.S.C. 751(a). Def. #3: Retyped indictment; Def.'s proposed jury instructions denied; Gov't submits opposition to Def.'s oral motion to dismiss for violation of Interstate Agreement on Detainers (IAD).
May 18	Def. #4: Bench warrant returned executed.
May 19	Def. #4: Def. sentenced to five years' imprisonment to run consecutively to any sentence now being served, subject to the provisions of 18 U.S.C. 4205(b)(2). Def. #4: Notice of Appeal filed.
May 26	Def. #3: Gov't moved for leave to file certified copies of exhibits of Circuit Court of Fairfax County, Virginia.
Jun 3	Def. #3: Reply to gov't's opposition to motion to dismiss indictment for violation of IAD filed by Def.

DATE	PROCEEDINGS
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1977

Jun 9 Def. #3: Opposition to Def.'s renewed motion to dismiss indictment for violation of IAD filed by gov't.

Jun 20 Def. #3: Memorandum on motion to dismiss filed by Def.

Jul 6 Def. #3: Def's. motion to set aside conviction heard and denied. Def. sentenced to five years' imprisonment to run consecutively to any Federal sentence now being served; judgment and commitment issued.

Def. #3: Notice of Appeal filed.

Jul 12 Def. #3: Court issues order directing Warden, Lorton Reformatory to provide Def. with access to law library, to arrange for transfer of his papers and personal documents to that facility, and to transport Def. by bus rather than by van in the future.

Jul 23 Def. #3: Court issues memorandum denying Def's. motion to dismiss indictment.

Jul 24 Def. #3: D.C. Corporation counsel moves to vacate order of July 12.

Aug 14 Def. #3: Opposition to motion to vacate order of July 12 filed by Def.

Nov 1 Def. #3: Motion for clarification of sentence filed by def.

1978

Feb 3 Def. #3: Def's. motion for clarification of sentence denied.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DOCKET ENTRIES

77-1404

UNITED STATES OF AMERICA

v.

CLIFFORD BAILEY

DATE	PROCEEDINGS
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1977

May 13 Appeal docketed.

Aug 16 Order consolidating with Nos. 77-1413 (Cooley), 77-1502 (Walker), 77-1602 (Cogdell), for consideration on the merits.

Oct 31 Order consolidating No. 77-1602 (Cogdell) with Nos. 77-1404, 77-1413, and 77-1502 vacated.

Dec 5 Oral Argument before Wright, McGowan, and Wilkey, JJ.

1978

Jul 12 Judgment entered reversing judgments of the District Court and remanding for a new trial.

Oct 19 Government petition for rehearing with suggestion for rehearing *en banc* denied.

77-1413

UNITED STATES OF AMERICA

v.

RONALD CLIFTON COOLEY

DATE	PROCEEDINGS
1977	
May 13	Appeal docketed.
Aug 16	Consolidated with Nos. 77-1404 (Bailey), 77-1502 (Walker), and 77-1602 (Cogdell), for consideration on the merits.
Oct 31	Order consolidating No. 77-1602 (Cogdell) with Nos. 77-1404, 77-1413, 77-1502 vacated.
Dec. 5	Oral argument before Wright, McGowan, and Wilkey, JJ.
1978	
Jul 12	Judgment entered reversing judgment of District Court and remanding for a new trial.
Oct 19	Government petition for rehearing with suggestion for rehearing <i>en banc</i> denied.

77-1502

UNITED STATES OF AMERICA

v.

RALPH WALKER

DATE	PROCEEDINGS
1977	
Jun 27	Appeal docketed.
Aug 16	Consolidated with Nos. 77-1404 (Bailey), 77-1413 (Cooley), and 77-1604 (Cogdell) for consideration on the merits.
Oct 31	Order consolidating No. 77-1602 (Cogdell) with Nos. 77-1404, 77-1413, and 77-1502 vacated.
1978	
Jul 12	Judgment entered, reversing judgments of the District Court and remanding for a new trial.
Oct 19	Government petition for rehearing with suggestion for rehearing <i>en banc</i> denied.

77-1602

UNITED STATES OF AMERICA

v.

JAMES T. COGDELL

DATE

PROCEEDINGS

1977

Aug 8 Appeal docketed.

Aug 16 Consolidated with Nos. 77-1404 (Bailey), 77-1413 (Cooley), and 77-1502 (Walker) for disposition on the merits.

Oct 13 Order consolidating with Nos. 77-1404, 77-1413, and 77-1502 vacated.

1978

Jul 12 Judgment entered reversing judgment of District Court and remanding for a new trial.

Oct 19 Government petition for rehearing with suggestion for rehearing *en banc* denied.UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Sworn in on October 4, 1976

Criminal No.

Grand Jury Original

Violation: 18 U.S.Code § 751 (a)
(Escape of Prisoner From Custody)22 D.C.Code § 2601
(Prison Breach)

THE UNITED STATES OF AMERICA

v.

CLIFFORD BAILEY

RONALD CLIFTON COOLEY

JAMES T. COGDELL

Also known as James T. Cogwell

RALPH WALKER

The Grand Jury Charges:

FIRST COUNT:

On or about August 26, 1976, within the District of Columbia, CLIFFORD BAILEY, having been lawfully committed to the custody of the Attorney General on March 6, 1973 and April 18, 1973, by virtue of a conviction and sentence imposed by the United States District Court for the District of Maryland in Criminal Case Numbers 72-0599 and 73-077, respectively, did unlawfully and wilfully flee and escape from such custody.

(Violation of Title 18, U.S.Code, Section 751 (a))

SECOND COUNT:

On or about August 26, 1976, within the District of Columbia, RONALD CLIFFTON COOLEY, having been lawfully committed to the custody of the Attorney General on May 20, 1976, by virtue of a conviction and sentence imposed by the United States District Court for the District of Columbia in Criminal Case Number 76-17, did unlawfully and wilfully flee and escape from such custody.

(Violation of Title 18, U.S. Code, Section 751(a))

THIRD COUNT:

On or about August 26, 1976, within the District of Columbia, JAMES T. COGDELL, also known as James T. Cogwell, having been in the custody under and by virtue of a commitment issued under the laws of the United States by a Judge of the Superior Court of the District of Columbia following his arrest on a charge of a felony, did unlawfully and wilfully flee and escape from such custody.

(Violation of Title 18, U.S. Code, Section 751(a))

FOURTH COUNT:

On or about August 26, 1976, within the District of Columbia, RALPH WALKER, having been lawfully committed to the custody of the Attorney General on April 11, 1973, by virtue of a conviction and sentence imposed by the United States District Court for the Eastern District of Virginia (Alexandria Division) in Criminal Case Number 27-73A, did unlawfully and wilfully flee and escape from such custody.

(Violation of Title 18, U.S. Code, Section 751(a))

FIFTH COUNT:

On or about August 26, 1976, within the District of Columbia, CLIFFORD BAILEY, having been committed to a penal institution of the District of Columbia, did

escape therefrom and from the custody of an officer thereof.

(Violation of Title 22, D.C. Code, Section 2601)

SIXTH COUNT:

On or about August 26, 1976, within the District of Columbia, RONALD CLIFTON COOLEY, having been committed to a penal institution of the District of Columbia, did escape therefrom and from the custody of an officer thereof.

(Violation of Title 22, D.C. Code, Section 2601)

SEVENTH COUNT:

On or about August 26, 1976, within the District of Columbia, JAMES T. COGDELL, also known as James T. Cogwell, having been committed to a penal institution of the District of Columbia, did escape therefrom and from the custody of an officer thereof.

(Violation of Title 22, D.C. Code, Section 2601)

EIGHTH COUNT:

On or about August 26, 1976, within the District of Columbia, RALPH WALKER, having been committed to a penal institution of the District of Columbia, did escape therefrom and from the custody of an officer thereof.

(Violation of Title 22, D.C. Code, Section 2601)

A TRUE BILL:

/s/ Anna E. Chambers
Foreman

/s/ Earl T. Silbert

Attorney of the United States in
and for the District of Columbia

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Sworn in on October 4, 1976

Criminal No. 76-735

Grand Jury Original

Violation: 18 U.S.C.Code § 751 (a)

(Escape of Prisoner From Custody)

22 D.C.Code § 2601

(Prison Breach)

THE UNITED STATES OF AMERICA

v.

CLIFFORD BAILEY
RONALD CLIFTON COOLEY
RALPH WALKER

The Grand Jury Charges:

FIRST COUNT:

On or about August 26, 1976, within the District of Columbia, CLIFFORD BAILEY, having been lawfully committed to the custody of the Attorney General on March 6, 1973 and April 18, 1973, by virtue of a conviction and sentence imposed by the United States District Court for the District of Maryland in Criminal Case Numbers 72-0599 and 73-077, respectively, did unlawfully and wilfully flee and escape from such custody.

(Violation of Title 18, U.S.Code, Section 751 (a))

SECOND COUNT:

On or about August 26, 1976, within the District of Columbia, RONALD CLIFTON COOLEY, having been

lawfully committed to the custody of the Attorney General on May 20, 1976, by virtue of a conviction and sentence imposed by the United States District Court for the District of Columbia in Criminal Case Number 76-17, did unlawfully and wilfully flee and escape from such custody.

(Violation of Title 18, U.S.Code, Section 751 (a))

THIRD COUNT:

On or about August 26, 1976, within the District of Columbia, RALPH WALKER, having been lawfully committed to the custody of the Attorney General on April 11, 1973, by virtue of a conviction and sentence imposed by the United States District Court for the Eastern District of Virginia (Alexandria Division) in Criminal Case Number 27-73A, did unlawfully and wilfully flee and escape from such custody.

(Violation of Title 18, U.S.Code, Section 751 (a))

FOURTH COUNT:

On or about August 26, 1976, within the District of Columbia, CLIFFORD BAILEY, having been committed to a penal institution of the District of Columbia, did escape therefrom and from the custody of an officer thereof.

(Violation of Title 22, D.C.Code, Section 2601)

FIFTH COUNT:

On or about August 26, 1976, within the District of Columbia, RONALD CLIFTON COOLEY, having been committed to a penal institution of the District of Columbia, did escape therefrom and from the custody of an officer thereof.

(Violation of Title 22, D.C.Code, Section 2601)

SIXTH COUNT:

On or about August 26, 1976, within the District of Columbia, RALPH WALKER, having been committed

to a penal institution of the District of Columbia, did escape therefrom and from the custody of an officer thereof.

(Violation of Title 22, D.C.Code, Section 2601)

A TRUE BILL:

Foreman

Attorney of the United States in
and for the District of Columbia

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Sworn in on October 4, 1976

Criminal No. 76-735-3

Grand Jury Original

Violation: 18 U.S.Code § 751 (a)

(Escape of Prisoner from Custody)

22 D.C.Code § 2601

(Prison Breach)

THE UNITED STATES OF AMERICA

v.

JAMES T. COGDELL

The Grand Jury Charges:

FIRST COUNT:

On or about August 26, 1976, within the District of Columbia, James T. Cogdell, having been in the custody under and by virtue of a commitment issued under the laws of the United States by a judge of the Superior Court of the District of Columbia following his arrest on a charge of a felony, did unlawfully and willfully flee and escape from such custody.

(Violation of Title 18, U.S.Code, Section 751 (a))

SECOND COUNT:

On or about August 26, 1976, within the District of Columbia, James T. Cogdell, having been committed to

a penal institution of the District of Columbia, did escape therefrom and from the custody of an officer thereof.

(Violation of Title 22, D.C.Code, Section 2601)

A TRUE BILL:

Foreman.

Attorney of the United States in
and for the District of Columbia

DEFENDANTS' PROPOSED INSTRUCTION NO. 1

DURESS

A defendant is not criminally responsible for the commission of the crime of willingly and voluntarily escaping from jail if he committed the act of escaping from incarceration as a result of coercion exerted on him.

Coercion which would excuse the commission of a criminal act must result from:

- 1) Threatening [*sic*] conduct sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;
- 2) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;
- 3) The fear or duress was operating upon the mind of the defendant at the time of the alleged act; and
- 4) The defendant committed the act to avoid the threatened [*sic*] harm.

When evidence of coercion or duress is present, the Government must prove beyond a reasonable doubt that the defendant did not act under coercion. In other words, if you have a reasonable doubt whether or not the defendant acted under coercion as the court has defined it to you, your verdict must be not guilty.

People v. Harmon, 394 Mich. 625, 232 N.W.2d 187 (1975); *People v. Luther*, 394 Mich. 619, 232 N.W.2d 184 (1975); Model Penal Code, Section 2.09 (Proposed Official Draft, 1962).

/s/ Gasch, J.

[denied—as submitted]

DEFENDANT BAILEY'S EXHIBIT No. 10

[SEAL]

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
WASHINGTON, D.C. 20001

Date—December 28, 1976

Clifford Bailey—E1
District of Columbia Jail
19th and D Streets, S.E.
Washington, D.C. 20003

RE: Clifford Bailey-et v. D.C. Govt. et al.

Dear Mr. Bailey:

This is to inform you that your petition to proceed in forma pauperis has been granted by the Superior Court, and has been assigned Civil Action Number CA 12495-76. Enclosed is a copy of the judge's order.

Summonses and Marshal's Service Forms are attached for your convenience. Please fill out these forms and return them for Marshal Service.

You are required to provide the Court with the original complaint and summons for filing. In addition, you must include copies of both the complaint and summons for each defendant.

All correspondence relating to the above case should reflect the Civil Action Number.

JOSEPH M. BURTON
Clerk

By /s/ [Illegible]
Deputy Clerk

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Cr. No. 76-735-4

UNITED STATES OF AMERICA

v.

CLIFFORD BAILEY, DEFENDANT
RONALD COOLEY, DEFENDANT
RALPH WALKER, DEFENDANT

Washington, D.C.
March 8, 1977

The above-entitled matter came on for trial in open court at 10:10 o'clock, A.M., before:

THE HONORABLE OLIVER GASCH
United States District Judge, and a Jury.

APPEARANCES:

Counsel for the Government:
STEVEN SCHAARS, ESQ.
Assistant United States Attorney

Counsel for defendant Bailey:
JOHN E. DRURY, ESQ.

Counsel for defendant Cooley:
ROBERT ROBBINS, ESQ.

RALPH WALKER, pro se

Also present: BRUCE ARMSTRONG, ESQ.

[2] PROCEEDINGS

THE DEPUTY CLERK: Criminal Case No. 76-735-4, The United States of America v. Clifford Bailey, Ronald Cooley and Ralph Walker.

(Defendants present in open court:)

THE DEPUTY CLERK: Shall I send for a jury panel?

THE COURT: Yes, Mr. Patterson.

MR. SCHAARS: Your Honor, if the record may reflect, I have served upon each defendant in this case and each counsel those acting as counsel for the defendants and those standing in as an assistant to the defendants acting in their own behalf, copies of a memorandum of law which we have filed with the Court this morning concerning the defense of duress or necessity, and I think the record should reflect that, and with regard to that defense we would suggest that based on the representations of those defendants who intend to raise that that they certainly on the face of this case cannot raise that defense, because each of them failed to report promptly to any sort of law enforcement, Congressional or judicial authority after their escape to, in an attempt to redress their grievances. I suggest that our memorandum addresses that issue specifically and in detail that in order to raise that defense one must be able to demonstrate that they presented themselves to the proper authorities for the redress of any grievance or anything that necessitated an [3] escape.

THE COURT: All right, Mr. Schaars, we will take that point up later when we reach the defense.

MR. SCHAARS: Yes, Your Honor.

* * * *

[12] (Whereupon, Government's Exhibits 1, 1-A, 1-B, 2, 2-A, 3 and 3-A were received into evidence.)

MR. SCHAARS: I would like to publish these before the jury by reading portions to them at this time.

Ladies and gentlemen of the jury, what has been [13] marked and admitted into evidence in this case is Government's Exhibit 1, 2 and 3.

* * * *

Government's Exhibit Number 1 is what is entitled: Writ of Habeas Corpus Ad Testificandum, which bears a seal from the Superior Court of the District of Columbia and the signature of Sylvia Bacon, Associate Judge, Superior Court of the District of Columbia.

It is a writ of habeas corpus in the case of the United States of America v. Brad King. It is a writ directing the warden of the United States Penitentiary, Leavenworth, Kansas, [sic] United States Marshal for the District of Columbia and United States Marshal for the District of Kansas to produce the body of Mr. Clifford Bailey, by you imprisoned and detained to either the U.S. Marshal in and for the District of Columbia or the U.S. Marshal for the District of Kansas or one of their deputies, so that Mr. Bailey can be brought to the District of Columbia on June 5th of 1976, so that he would be available to testify for trial. In this particular case, United States v. Brad King on June 14th of 1976.

* * * *

[17] RONALD JAMES HARVIN

was called as a witness by and on behalf of the United States and after having been duly sworn was examined and testified as follows:

* * * *

[23] By Mr. Schaars:

Q All right, sir, I refer you to specifically Government's Exhibit 4. The face sheet, if I may show you a copy of it. I direct your attention to the upper left hand corner. [24] Whose name appears on that document, sir?

A Clifton Bailey.

Q Now, sir, I refer you to the right hand side of that document. One line down, where it says, "commitment date." Is there a date there?

A It is June the 1st 1976.

Q Sir, what is this document? What does it purport to be?

A This is a Face Sheet No. 1 that is completed upon commitment to the Detention Services.

Q What does this document reflect in terms of commitment?

A The date that an individual was received into custody.

Q Who is the individual here and when was he received in custody?

A Clifton Bailey. He was received on June 1st, 1976.

Q Now, sir, I'm going to refer you to the next Government exhibit that has been marked as 4. It would be 4-A, and ask if you can indicate to the ladies and gentlemen of the jury what that is.

A It is an Escape and Apprehension Form. It is used by the Department of Corrections.

Q Does a name appear on there, sir?

A Yes, sir.

Q Whose name is that?

[25] A Clifton Bailey.

Q Does it reflect any dates or times with regard to an escape?

A It reflects a date of escape at 5:35 A.M. on August 26th 1976.

Q Are Government's Exhibits 4 and 4-A related at all? You used the same name, sir.

A They are from the same institution.

Q Do they relate to the same individual?

A Yes, sir.

Q Now, sir, I'm going to invite your attention to what has been marked as Government's Exhibit 5. Is there a Face Sheet in connection with those exhibits, sir?

Mr. Harvin, I specifically draw your attention to what bears a photograph within those exhibits.

A This is an Escape and Apprehension Report.

Q Whose name is that, sir?

A Ronald Clifton Cooley.

Q Does that bear a date, sir?

A Yes, it does.

Q What date does that bear?

A August 26th.

Q Of what year, sir?

A 1976.

Q Now, sir, drawing your attention to the last [26] packet of documents which you have. Do you have what you referred to as a Face Sheet in connection with that packet?

A Yes, sir, I do.

Q What is the identification number of that piece of paper?

A 158630.

Q No, sir, I'm referring to the yellow stamp.

A Government's Exhibit 6.

Q Is there a name that appears on that, sir?

A Ralph Walker.

Q Is there a commitment date, sir?

A June 11th 1976.

Q What does that document reflect?

A That the individual was committed on that date in the custody of the Department of Corrections.

Q Now, sir, referring you to the next portion of the documentation labeled Government Exhibit 6 portion with a photograph on it. What yellow stamp appears on that, sir?

A That is Government Exhibit 6-A.

Q What does that document purport to be?

A It is the Escape and Apprehension Report that was filed on August the 26th 1976.

Q What is the name of the individual on that, sir?

A Ralph Walker.

Q What is the relationship of that document to the other document that you indicated bore the name Ralph Walker?

[27] A They are both from the same individual's record jacket.

Q Now, sir, have you had a chance to review the files of each of these gentlemen?

A Yes, I have.

Q The files of the Department of Corrections?

A Yes, sir.

Q You are familiar with the record keeping of the Department of Corrections?

A Yes, I am.

Q Are you familiar with the paper work that is undertaken and that is preserved when an individual is to be released from an institution?

A Yes, sir.

Q Is there paper work prepared when one is to be released with permission from an institution?

A Yes, sir.

Q Did you search these files to see if there was any such paper work in any one of these gentlemen's files? Did you search the files, sir?

A Yes, sir, I did search the files.

Q Were you able to discover whether or not there was any paper work or any forms or business records indicating that any one of these gentlemen was permitted to leave the institution on or about the 26th of August of 1976?

[28] A No, sir, there was no such paper.

Q If these gentlemen had been permitted to leave the Detention Facility would there have been paper work?

A Yes, sir, there would have been.

Q Now, sir, with regard to Mr. Cooley. Did you have an opportunity to review the file of Mr. Cooley?

A Yes, sir.

Q And does the file of Mr. Cooley reflect his coming to the institution?

A Yes, sir, it does.

Q Do you know what that date is, sir?

A I would have to check on the Face Sheet for that particular individual. I don't have that with me at this time.

Q Did you have an opportunity to review the documentation to determine whether or not Mr. Cooley was an inmate on August 25th of 1976?

A Yes, he was.

Q He was an inmate?

A Yes, sir.

Q On August 26th you have a sheet indicating an escape, is that correct, sir?

A Yes.

* * *

[52] RE-CROSS EXAMINATION

By Mr. Drury:

Q Mr. Harvin, are the records that are under your supervision and the records that you have been re-

ferring to here this afternoon, are they the complete file of any inmate at the New or Old D.C. Jail?

A They are the complete file for the Department of Corrections that we have on hand.

* * *

[56] Q And does defense exhibit number 2 reflect that same record? That would be Defense Exhibit No. 2 that you have in your possession, the folder?

A Oh, the folder itself? Yes, it does.

Q And he was brought back here to testify in a trial, is that correct on a habeas corpus ad testificandum?

A That is true.

Q And the escape occurred—does the subpoena note the date of the trial in Government's Exhibit No. 1?

A It says for the individual to be available to testify for trial in this case presently set for June 14th.

Q I see. Now, subsequent to June 14th, this assuming [57] testimony was given. Why was this—

THE COURT: Now, Mr. Drury, we all know there are many continuances in the Superior Court. There are many continuances in this Court.

MR. DRURY: Your Honor, I believe that we will be able to show that the case did take place in the month of June or early July, sir.

MR. SCHAARS: Your Honor, I don't see the relevancy of that as regards the Government's case and the cross-examination of this witness. It has nothing to do with whether or not he escaped.

THE COURT: Yes, I think that is correct.

MR. DRURY: I will move on to another subject, Your Honor.

THE COURT: All right.

* * *

[62] BARRY COLVERT

was called as a witness by and on behalf of the United States and after having been duly sworn was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Schaars:

Q Sir, would you please state your name?

A My name is Barry Colvert.

[63] Q How are you employed, sir?

A I'm assigned as a Special Agent with the Washington Field Office of the F.B.I.

Q How long have you been so employed?

A Approximately fifteen years.

Q Is it then fair to say that in August of 1976 you were with the F.B.I.?

A That is correct.

Q I invite your attention to the 26th of August of 1976. Were you an F.B.I. agent at that time?

A Yes, sir, I was.

Q Do you recall whether or not you were on duty on that date?

A Yes, sir, I was.

Q Do you recall what your hours of duty were that day, sir?

A I think I came in at approximately 6:30 in the morning and worked until around 6:00 o'clock that night.

Q Now, sir, during the course of your tour of duty or your work hours on that particular day, did you become involved in, or assigned to the investigation of a jail break within the District of Columbia?

A Yes, sir, I was.

Q And, as a result of your participation in that investigation did you actually assist in the arrest of some [64] individuals who allegedly escaped?

A Yes, sir, I did.

Q Do you recall the names of the individuals whom you participated in the arrest of?

A Mr. Clifford Bailey. Mr. Ralph Walker. Mr. Ronald Cooley and Mr.—that would be it.

Q Now, sir, do you see any or all of those individuals in Court at this time?

A Yes, sir, I do.

Q If so I would ask that you identify them by location in the courtroom and by wearing apparel.

A Mr. Walker is seated at this end of the defense table with a burgandy or maroon sport coat on. Mr. Bailey seems to be wearing a blue shirt, and Mr. Cooley, seated at the far end of the table is wearing a green shirt.

Q Could you be a little bit more specific? There are at least three gentlemen over there with blue shirts on.

A The gentleman turning around, facing the Marshal with a blue chambray or prison type shirt on, and the other gentleman at the far end, between two gentlemen in the suits wearing a green wollen [sic] jacket over a light blue shirt.

Q Who is the last gentleman?

A Mr. Cooley.

Q I would ask that the record reflect that Mr. Colvert has in fact identified each of the defendants in this case.

[65] THE COURT: Very well.

By Mr. Schaars:

Q Now, sir, with regard to Mr. Bailey. Will you, if you know, advise the Court of the nature of your assistance when the arrest of Mr. Bailey occurred?

A It was on November the 19th, last year. The address was 1236 11th Street, Northwest in the 7th floor apartment, I believe Apartment 77.

Q Was that within the District of Columbia?

A Yes, sir, it was.

Q Did you assist in the arrest of the gentlemen whom you have identified in Court today?

A That is correct.

Q Now, with regard to Mr. Cooley, sir. Did you assist in that arrest?

A Yes, sir, I did.

Q Where did that take place and when?

A September 27th, last year. The address was 4229 2nd Place, Northeast.

Q Is that within the District of Columbia?

A It was in Washington, D.C.

Q One of the gentlemen you identified in Court today?

A That is correct.

Q Now, with regard to the last gentleman, Mr. Walker. Did you assist in the arrest of Mr. Walker?

[66] A Yes, sir, I did.

Q When did that take place, sir?

A December 13th last year at Number 39 Mississippi Avenue, Southeast in the basement apartment.

Q Is that within the District of Columbia?

A That is correct.

Q Is that the Mr. Walker whom you have identified in Court today?

A Yes, sir.

* * * *

CROSS-EXAMINATION

By Mr. Drury:

Q Agent Colvert, did you say that you arrested Mr. Bailey or that you assisted in the arrest?

A I assisted in the arrest of Mr. Bailey.

[68] By Mr. Drury:

Q Directing your attention Agent Colvert to Defendant's Exhibit 3. I ask you whether you can identify that document, if so how can you?

A This is an F.D. 302 that reflects the apprehension of Mr. Clifford Bailey at 1236 11th Street.

Q Is that an official or recognized copy of the official document that contains the report by the Federal Bureau of Investigation as to the apprehension on the 19th of November of 1976 of Clifton Bailey?

A That is correct.

Q In the text of that document is there reference to the agents, Dean, Patriak, Fluharty and another agent?

A Yes, sir, there is.

Q Who is the other agent?

A Mr. Patrick, Mr. Murphy, Mr. Dean and Mr. Fluharty.

Q If you were present on the scene why is your name not present, mentioned in the body of that text?

A They were emerging from Apartment 77 with Mr. Bailey in custody when I came on the scene. I observed the arrest.

* * * *

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Cr. No. 76-735-4

UNITED STATES OF AMERICA

v.

CLIFFORD BAILEY, DEFENDANT
RONALD COOLEY, DEFENDANT
RALPH WALKER, DEFENDANT

Washington, D.C.

March 9, 1977

The above-entitled matter came on for further trial in open court at 9:50 o'clock, A.M., before:

THE HONORABLE OLIVER GASCH
United States District Judge, and a Jury.

* * * *

[94] THE COURT: Now, with respect to the defense. The Court read the Federal cases which are cited on Page 6 of the memorandum submitted by the Government. The cases stated, particularly Joiner, Woodring, Miller and Coggins, I think state the law that would be applicable to this case. I am not sure that I understand the relevancy of the cases cited by Mr. Drury, one of them was not an escape case.

MR. DRURY: Cassell is not an escape case, Your Honor. It deals with the Jones-Miller Act, narcotics offense, but Witsnow is a case—

THE COURT: That was tried by Judge Smith. He made no findings and conclusions. The matter was referred back to him and subsequently affirmed.

MR. DRURY: Yes, Your Honor. But it dealt with the [95] essential element of escape under the Federal Statute and that was criminal intent, and as you know the Cassell case is cited in the Snow case and the Cassell case, perhaps is the touch-stone for the argument that

I am making and it is refined in Snow and it is refined by Judge Bazelon, which he says that a necessary element of any criminal offense under escape, under the crime charged here is that, that of criminal intent and that there must be a showing that the act was committed or at least the defense should have the opportunity to show that the act was committed under compulsion such as apprehension of serious and immediate bodily harm, and that that act was involuntary and therefore not criminal.

THE COURT: Well, I understand that theory. Of course the cases also mention the obligation of one who escapes under those conditions to turn himself in having affected the escape.

MR. DRURY: Your Honor, I would contend that Snow is controlling. The cases that the Court has referred to in memorandum submitted by Mr. Schaars are not cases dealing with the law in the District of Columbia.

THE COURT: Well, in the District of Columbia it's no different.

MR. DRURY: Your Honor, I believe from my research in this case, and I spent a short time this morning attempting to find further authority for the argument that I am [96] asserting, in the library, and I believe the issue is unresolved in the District of Columbia.

THE COURT: Certainly doesn't resolve it.

MR. DRURY: I think Snow says, Your Honor, that the defense should be allowed to submit evidence negating criminal intent.

THE COURT: Well, I am disposed to agree with that.

* * *

[122] MR. SCHAARS: Your Honor, the Government has no further evidence to offer in its case in chief at this time.

[123] THE COURT: All right.

MR. SCHAARS: The Government, accordingly, rests, Your Honor.

THE COURT: All right.

Ladies and gentlemen, you may step into the jury room, briefly.

(Whereupon, the jury retired to the jury room and the following proceedings were had out of their hearing and presence:)

MR. SCHAARS: Your Honor, if I may be heard just briefly before Mr. Drury begins. I have rested, but I rested for the purposes of the jury having heard that. It is my intention to move into evidence in this case all exhibits which have not been admitted to this date and at the same time I would seek leave to, at the conclusion of the case withdraw the original copies of those items of evidence which do not have Xerox copies in evidence now and substitute true and accurate Xerox copies for those documents.

THE COURT: Are there any Government exhibits that have not been received?

THE DEPUTY CLERK: No, Your Honor. All of the Government exhibits have been moved in and received.

MR. DRURY: I see no objection to any of the change in documents except one. I note that this master fingerprint card, which is Government's Exhibit 13-A notes no [124] date. However, it notes on the second page a crime of attempted robbery. I would ask that that be—that the words, "attempted robbery", be deleted from this document.

MR. SCHAARS: We certainly have no objection to that, Your Honor.

THE COURT: That will be done.

Now, gentlemen, it is my impression that the Government has made out a prima facie case. If any of you have anything specific to bring to my attention with reference to failure of proof on the part of the Government I will hear you briefly.

MR. DRURY: I want to note that I move for a motion for judgment of acquittal with regard to Clifton Bailey.

I would contend that the Government has not proved identity in this case. Moreover, I would contend that the

Government is under an obligation to demonstrate the means with which this escape occurred. This has been a documentary case. I believe that because it has been a documentary case, and because it has been demonstrated, at least in part that through Government witnesses that there is a potential for human error in the compilation of documents. I believe that that supports the reason why there should be a showing of the manner in which, the exact manner, the exact location where the escape occurred, and that the Government should not proceed on a mere documentary case and showing that the man was [125] there one day and that he was absent on August 26th.

THE COURT: I will overrule you on that. Ghoram and Jones, the Government was unable to prove how they knotted the sheets together and got out of the third floor of the jail or whatever it was, so I will overrule you on that.

MR. DRURY: Court's indulgence for one moment. I want to point this document out to Mr. Patterson. 13-A, second line down, under "crime".

MR. SCHAARS: We would be happy to provide Mr. Patterson with another Xerox copy of that page, the attempted robbery, so there is no scratching on there at all.

THE COURT: All right. Now, Mr. Robbins.

MR. ROBBINS: I too wish to move for a judgment of or a motion for acquittal on behalf of Mr. Cooley. I adopt Mr. Drury's arguments for the record and also note that the failure in the case against Mr. Cooley, specifically with the records is that there has been no records introduced to show that Mr. Cooley was in the New D.C. Jail on August 26th or on the dates before. The records indicate that he was committed to the D.C. Jail which a witness said commonly meant the Old Jail. He was committed there on April the 10th of 1976. There were no records and no testimony to indicate that he was there prior to—in the New Jail prior to August the 26th, and this points even further to the problems with the Government's case in that it was only documentary evidence, [126] not testimonial evidence. There was no

testimony either to indicate that Mr. Cooley was in the New Jail prior to August the 26th, only the documentary evidence which fails on that point.

THE COURT: All right. Same ruling.

Now, Mr. Walker. Do you wish to adopt the motions previously made?

THE DEFENDANT WALKER: Yes. Defendant wishes to adopt both counsel Robbins and Drury.

THE COURT: All right. Same ruling.

THE DEFENDANT WALKER: As far as judgment of acquittal is concerned?

THE COURT: Yes.

THE DEFENDANT WALKER: All right.

* * * *

[149] BERNARD EUGENE WILSON

was called as a witness by and on behalf of the defendant Ralph Walker and after having been sworn was examined and testified as follows:

DIRECT EXAMINATION

BY THE DEFENDANT WALKER:

Q Mr. Blake, would you state your full name to the Court, please?

A Bernard Eugene Wilson.

Q Bernard Eugene Wilson?

A Yes.

Q All right. Mr. Wilson, where are you presently located, or where do you presently reside?

A At Lorton Reformatory.

Q Mr. Blake, I call your attention—Excuse me. Where [150] were you, or what was your residence during the period of between August the 1st and August the 26th?

A I believe I had been at 1901 D Street, Southeast, District Jail.

Q All right. Was there any particular housing unit that you were housed in or do you remember the housing unit that you were housed in at that time?

A Yes. Northeast One.

Q The Northeast One housing unit?

A Yes. Dead lock.

Q Of the District of Columbia Detention Facility?

A Yes.

Q Is that a maximum security section?

A Yes.

Q Do you recall whether an inmate by the name of Ralph Walker, El, that would be myself, was housed with you there?

A Yes.

Q All right. Mr. Blake on any occasion there do you recall any burnings or fires that took place between August the 1st and August 26th?

A Every day.

Q Every day?

A Every day.

Q Do you recall any inmates of the Northeast One housing unit complaining of any type of illnesses and specially [151] concerning smoke inhalation?

A Yes. The ventilation unit, you know, all of windows and so forth, all of the inmates started breaking out the windows for air inside of the units.

Q You say that there is no ventilation or there is no air? In other words, are you saying that there are no open windows?

A No open windows.

Q At the Detention Facility?

A Probably is now, but then there wasn't.

Q You say that also that inmates had started breaking out windows?

A Yes.

Q Were these windows broken out as a direct result of the fires that were set?

A Yes.

MR. SCHAARS: Object. The extent of this gentleman's knowledge as to why they were broken out—

THE COURT: I think if you tell him under what circumstances were the windows broken out maybe he can answer it without a leading question.

BY THE DEFENDANT WALKER:

Q Under what circumstances were the windows broke out Mr. Wilson?

A For air because of smoke.

[152] Q Did you, yourself, personally suffer any type of smoke inhalation?

A Yes.

Q Did you complain to the authorities about suffering from any type of smoke inhalation?

A Yes.

Q Were you ever able to receive any type of medical attention because of your complaints?

A No.

Q How often did you complain, Mr. Wilson?

A More than ever day that I stayed down there. I stayed down there almost a month and a half.

Q And how often did you say burnings took place?

A Just about every day I was down there.

Q Were there, to your knowledge, any physical beatings by the authorities there at the jail while you were there?

MR. SCHAARS: Objection, Your Honor. It is another leading question.

THE COURT: Overruled.

THE DEFENDANT WALKER: Would you answer the question, Mr. Wilson?

THE WITNESS: Yes. I got beat a few times.

BY THE DEFENDANT WALKER:

Q You say that you were personally beat?

A Yes.

[153] Q Who were you beat by, Mr. Wilson?

A A guard by the name of Officer Webb.

Q Would the record reflect that Mr. Wilson indicates that he was beaten by an officer by the name of Mr. Webb.

THE COURT: Yes. The testimony is reflected in the record.

BY THE DEFENDANT WALKER:

Q Do you remember on what date you were beaten, Mr. Blake?

A No, I can't—

Q Or, Mr. Wilson.

A I can't remember all of the dates it happened, but I know incidents that did take place, you know.

Q Do you remember what month it took place?

A Yes. August.

Q August?

A Yes, it has been August.

Q Do you remember what the beating resulted from?

A Yes.

Q Would you explain to the Court, please.

A Yes. It was, resulted from me supposing had been a friend of some inmate that was in the jail by the name of Clifton Bailey or something. Somebody told me that I was a friend of his, and they told me that I should deliver a message to this dude.

Q That you should deliver a message to the dude?

[154] A Deliver a message to him.

Q To who?

A To this guy by the name of Clifton Bailey. He told me, they said, "since he's one of your buddies, you deliver him this message. You tell him that we are going to kill him and he's also going to receive some of the treatment that you just received for testifying in the Brad King case this summer."

Q Mr. Wilson, would you describe the incident that took place when this officer, Officer Webb beat you?

MR. SCHAARS: Your Honor, I must object again. We are not concerned whether this gentleman says he was beaten; whether or not Mr. Walker has a defense along those lines.

THE COURT: I think some leeway should be accorded the defendant, Mr. Schaars. However, having already brought out something of his own personal recollection now I would ask you to confine your questions to what he knows about your condition.

THE DEFENDANT WALKER: Your Honor, what I'm asking him is—

THE COURT: I understand what you're asking.

THE DEFENDANT WALKER: It is my position—

THE COURT: I would like you now to go into what happened to his knowledge concerning yourself.

BY THE DEFENDANT WALKER:

[155] Q Mr. Wilson, excuse me. Were there any other beatings that took place at the jail during the time that you were there in the Northeast One housing unit?

A Yes, more or less like that, a every day thing.

MR. SCHAARS: I'm sorry. I can't hear the witness.

THE DEPUTY CLERK: Pull the mike up.

THE WITNESS: I'm saying this is more or less like an every day thing that went on down there.

BY THE DEFENDANT WALKER:

Q All right.

Defense has no more questions.

THE COURT: Any other defense counsel wish to ask questions?

CROSS-EXAMINATION

BY MR. DRURY:

Q Sir, my name is John Drury and I am defense counsel for a gentleman who is on trial today by the name of Clifton Bailey.

Now, do you from your personal knowledge know Clifton Bailey?

A No.

Q I see. Have you ever met him before? Have you ever met anybody by the name of Bailey at the District of Columbia Jail or at Lorton?

A That is when I first met him over at the jail.

[156] Q I see. Do you know him by any name other than his name, Clifton Bailey?

A No.

Q Do you know a person by the name of Sonny?

A No, I can't remember. I know a few Sonnys, you know.

Q Mr. Bailey, would you stand up?

This is my client, Clifton Bailey. Have you ever met him before?

A I have seen him over at the jail. Personally, I have seen him. We had a confusion, you know. I personally don't know him.

Q Well, now your name is Bernard Eugene Wilson, is that correct?

A Right.

Q Mr. Walker-El referred to you as Mr. Blake. Could you please explain to the ladies and gentlemen of the jury why he referred to you as Blake?

A Well, like during my, you know, my prior history as a child, so forth I sorta like figured I was getting out of the Department of, you know—the place. In other words, I was trying to get out of the place and I gave them a false name, you know, thinking I could get out.

Q But you are known both as Mr. Blake and Mr. Wilson?

A Right.

[157] Q Do you mind if I refer to you as Mr. Wilson?

A It doesn't make any difference.

Q Now, as I understand from your testimony you are at Lorton, Virginia, is that correct?

A Yes.

Q Prior to being at Lorton you were at the D.C. Jail. Now, when was it that you were transferred to Lorton?

A I was transferred to Lorton—

Q Now, let me—Mr. Wilson, this is a microphone. The best way to give any testimony in this case is to lean forward and to speak very closely to that microphone so all of the ladies and gentlemen in the courtroom and of course the ladies and gentlemen in the jury box might hear you.

Now, when were you transferred to Lorton?

A I had been transferred to Lorton twice. Which are you referring to?

Q I am actually referring to your present commitment to Lorton.

A Just my present commitment, just when I got down to Lorton last month.

Q So that would be in February.

A February.

Q Where were you prior to that?

A Everywhere.

Q Well, were you at D.C. Jail?

[158] A Right.

Q Now, during the summer months, June, July, and August of last year were you at D.C. Jail?

A Yes.

Q When did you first see my client, Mr. Bailey who I have shown to you?

A The day I went down in dead lock there was an incident. Him and some other guy was having an incident in the hall.

Q Okay. Let me first of all ask you questions concerning the New D.C. Jail. Is that where you were?

A Right.

Q And the D.C. Jail is divided into sections. One of the sections being Northeast One?

A Right.

Q And that means that it is the—in the Northeast section on the first floor, is that correct?

A Right.

Q Is there a particular—Is the Northeast section of the first floor, is that what they call dead lock?

A Right.

Q And is dead lock a place where they put prisoners who have difficulty at the jail, who need protection or to perhaps—who perhaps want to be removed and separated from the normal population of the prison?

[159] A Right.

MR. SCHAARS: Objection. He is asking the witness to testify as to correctional policies.

THE COURT: Yes. I think he can probably tell you a good deal about that without a leading question, Mr. Drury.

BY MR. DRURY:

Q From your knowledge could you explain what dead lock is and speak very loud so the ladies and gentlemen of the jury can hear you.

A Dead lock is a segregated part of the jail for inmates who are under protective custody, for inmates who can't function in open population and inmates under threat of inmates within the jail.

Q Is an inmate—Strike that.

How many individuals are there in dead lock?

A Eighty.

Q Eighty?

A Yes.

Q Are they all on the ground floor or on one floor or are they on tiers, sir?

A They are tiers.

Q Now, are you ever let out of dead lock during the day time?

A No. No.

Q Could you tell me the manner in which you—Strike [160] that.

How many individuals are in each cell in dead lock?

A One.

Q Between each individual cells are there bars or are there walls in which you cannot talk through?

A There are walls.

Q Can you see the person next to you in the other cell?

A No.

Q Can you see the person across the hall in the other cell?

A Yes, sometimes. If he is directly across from you.

Q Now, I assume that there is a door?

A Right.

Q Is there anyway that you can look out of that door?

A Oh, yeah, you can look out the door. It is just bars on the front of the door.

Q Is it a completely barred door or is there only a little peep hole?

A There is a complete—In the Northeast One there is complete bars. The rest have, you know, doors.

Q You have explained to us what dead lock is like. How did you happen to see my client, Mr. Bailey, there?

A I seen him arguing with a dude who is a friend of mine. They had somewhat of a conflict. The dude was more or less like a personal friend of mine.

[161] Q By "the dude" you mean a friend of yours in jail?

A Yes.

Q With the exception of this time, how would you have an occasion to see someone like Mr. Walker-El or Mr. Bailey?

Would you ever meet in the hallway?

A No. No.

Q Are you allowed out of your cell?

A To take a shower. Sometimes they permitted you to make a phone call, or if you're going to medical or something like that.

Q Now, you have described that you, or you have related to the jury that you first saw Mr. Bailey and that you knew that he was in Northeast One, the dead lock section sometime in the summer of 1976, is that correct?

A Right.

Q And you have referred in your testimony to burnings. Who starts these fires?

A I don't know. I don't know.

Q My question is: Do the inmates start the fires or do the guards start the fires?

A It is actually hard to say. Like I can't tell what actually goes on outside of my cell.

Q You cannot see to the left and you cannot see to the right out of your cell, but you notice that there were fires occurring in the hallways or in other cells?

[162] A Well, you know inmates would set their own cells on fire, but they would set some outside of the tiers, you know.

Q What would the guards do?

A Nothing. Let it burn.

Q What would they use for fire, for kindling? Would they use cigarette packs or what, sir?

A Use things that was burnable.

Q Would there ever be any attempt to put out these fires by the guards?

A Oh, no. They go in the office. They have a little booth, so forth. They go in the office, shut the booth door.

Q I can't hear you, sir. I'm less than ten feet away from you and I can't hear you.

A Well, like when the fire starts, like they normally go inside of their booth and close the door.

Q Their booth?

A Yes, and then like they don't worry about what goes on outside.

Q With regard to an individual cell. Are there any windows in your cell?

A Umm.

Q What are the windows like? Are the long windows, length wise or are they little peep holes?

A Long windows, you know.

[163] Q I see. Now, are they barred?

A Yes.

Q Is there glass?

A Yes.

Q Can you open the window and get fresh air?

A Yes; take the glass out.

Q In the normal occurrence of events can you turn a knob on the window between the bars and get fresh air?

A No.

Q What would happen when these fires are started and the smoke would filter into your cell?

A I tore my window out.

Q Pardon me.

A I tore my window out.

Q You broke it out?

A Yeah.

Q Is there airconditioning in Northeast One?

A In the winter time.

Q Is it in the summer, sir?

A No.

Q You have referred to physical beatings that occurred. Now, there are fights between inmates, are there not?

A Umm, umm.

Q And are these the beatings that you are referring?

A Uh-huh.

[164] Q Speak up, sir. What are the beatings that you are referring to?

A I'm speaking about the beatings that the guards will do to inmates. I mean like the jail, I mean like I was—asked to transfer to any other institution, wherever the man has custody rather than that institution. I didn't want to stay up there for sure.

MR. SCHAARS: I object to this at this point. He is giving his reaction to this stuff rather than what Mr. Walker's defense purports to be.

MR. DRURY: I am merely trying to get a clear picture of the beatings and who the beatings are directed against. My next question is: Why the beatings are directed against them.

THE COURT: You may question the witness.

BY MR. DRURY:

Q The beatings are conducted by the guards, by one or two guards?

A Normally—

Q You will have to speak up.

A I would say there would be numerous. More than one. Sometimes like it would be maybe six or seven guards, you know.

Q Now, are the beatings inside an individual cell or outside of an individual cell?

A They come in your cell.

[165] Q Well, how would you know that these beatings were occurring? You can't see left, you can't see right. You can only hear out the window.

A All you have to do is hear.

Like the guy who slept next door to me, you know, there was evidence that they was practically killing him. He was hollering when they brought him out of the cell. He was bleeding half to death. Nobody else in the cell. He was by himself. All of the other inmates were locked up.

Q Thank you. My question—The next question that I have is: If the inmates are not allowed out of the cell what is going to cause, from your experience, a D.C. Jail guard to go into the cell and beat a man?

A I don't know what caused that. I don't know.

Q Were you ever beaten?

A Yeah.

Q Why?

A I don't know. They told me to deliver a message. Simply for that. The next thing I know they came down to my cell and tried to beat me half to death. I got all cut up so forth for nothing.

Q Let me ask you this: Have you ever heard of the Brad King case?

A That is part of what the guards was discussing with me.

[166] Q Slow down in your testimony. Speak to the ladies and gentlemen of the jury.

MR. SCHAARS: Your Honor, that is not responsive to the question. The question was: Had he heard and he answered that.

THE COURT: I sustain the objection.

BY MR. DRURY:

Q In what context have you heard of the Brad King case?

A From a guard.

Q Who was the guard?

A Officer Webb, same one that beat me.

Q You said Officer Webb?

A Right.

Q Could you tell us what the officer told you and when, sir?

First of all, when?

A This was—

MR. SCHAARS: Your Honor, that is hearsay.

THE COURT: Yes. Sustained.

MR. DRURY: Your Honor, I believe that at a later point in time that there will be some corroboration from my client concerning that. I believe in order to shorten the defense presentation in this case it is necessary for me to not bring back Mr. Wilson at a later time, but to elicit this [167] testimony now.

THE COURT: Hearsay is hearsay. It is not evidence.

MR. DRURY: Thank you, Your Honor.

BY MR. DRURY:

Q Did you testify in the Brad King case?

A No.

Q Did you ever know a person, personally, Brad King?

A No, I did not.

Q Did you know if anyone testified in the Brad King case?

A Yes. They told me that this dude did.

Q Did you know whether someone testified in the Brad King case?

A Yeah.

Q Was that person an inmate in Northeast One?

A Yes.

Q Was there ever any—strike that.

Is there a medical facility down at the new D.C. Jail?

A Yes.

Q Do doctors and nurses staff that medical facility?

A Yes.

Q Have you ever gone to that medical facility?

A Yes.

Q Have you ever been treated for any type of an illness or a cut or any type of disease?

A Yes. I was treated for a cut.

Q Have you ever gone there for any type of smoke inhalation which would mean being overcome by smoke?

A No.

Q Have you ever been present when anyone has, a prisoner has been brought into the jail who has been subject to breathing too much smoke or inhaling too much smoke?

A Yes.

Q Have you ever seen any prisoners in Northeast One being taken out by the guards as a result of inhaling too much smoke?

A Yes.

Q Would the people who had been overcome by smoke have been ill as a result of the fires that were started?

MR. SCHAARS: Objection, Your Honor.

THE COURT: He can state what he has observed concerning those people.

BY MR. DRURY:

Q After the fires have been put out, either burned themselves out, an inmate has placed them out, what action has been taken by the authorities with regard to inmates who have been sickened by too much smoke?

A What action would be taken?

Q Yes.

[169] A I have never seen no action taken.

Q I can't hear you. But you have seen people taken to the medical facility for smoke inhalation?

A I don't know where they was taken. I know they was taken—I know they was taken out of the unit.

Q I see.

MR. DRURY: Court's indulgence for one moment. I have no further questions.

* * *

THE COURT: Mr. Robbins.

CROSS-EXAMINATION

BY MR. ROBBINS:

Q Mr. Wilson, my name is Robert Robbins. I am representing Mr. Ronald Cooley today. Do you know Mr. Cooley?

A Yes.

Q During the summer of 1976 when you were in Northeast One in the Jail were you acquainted with Mr. Cooley?

A We weren't acquainted. I had known him.

Q Was he in that same housing unit at that time?

A Yes.

* * *

[170] Q Did you ever see him during the summer of 1976 with any physical injuries

A Umm.

Q Could you describe those, please?

A I have seen them take him—

Q Could you please speak up?

A It wasn't a physical injury. What it was, was they taking him out of the block. He was vomiting some kind of black stuff. I don't know what it was. I don't know what happened to him. When he was around there one time they took him out. He must have had an argument with one of the guards. They took him out up to the clinic. I don't know what actually happened or caused it.

Q Can you specifically remember when this was?

A This was in the month of—I can't be—you know, approximately. My day can't be processed up to the

exact date, but it would have to be within July or late part of July or early part of August.

Q Are there any other incidents that you remember with regard to Mr. Cooley?

A Involving this case?

Q Similar incidents to what you just described or [171] any other physical injuries.

A I recollect—discussed all the things that happened. Like at the jail, if it doesn't have anything to do with this case—

Q I am only concerned about Mr. Cooley.

A You mean have I ever seen anything happen to him? Those are the only two things I ever seen happen to him, the few times they would let him out to take a shower then one of the guards would be intimidating him or something like that, pushing him down to the shower, telling him to take a shower with the handcuffs and shackles. I remember things like that.

Q Now, earlier you said that he was taken out of his cell and he was vomiting.

A Yes.

Q Do you know why he was taken or where he was taken?

A No. I don't know where he was taken. I actually—I don't know what goes on. I was outside of Northeast One after they take him out of there.

Q Do you know what occurred before that?

A Yes. They was burning up a whole lot of sheets, so forth around the back hall.

Q Who was?

A I don't know. I don't recall the names.

Q And, after that you saw Mr. Cooley being taken out [172] of the cell?

A Right.

Q Now, Mr. Wilson, you said earlier that you had been taken to the hospital at one point for a cut.

A Yes.

Q Why were you taken to the hospital?

A Because Officer Webb, you know, I was in my room sleeping and he came in there and just—I don't know, just went off.

Q Who did this?

A Officer by the name of Webb.

Q A moment's indulgence, Your Honor.

THE COURT: All right.

MR. ROBBINS: No further questions, Your Honor.

THE COURT: Mr. Schaars.

CROSS-EXAMINATION

BY MR. SCHAARS:

* * *

[176] Q You have testified that your cell was around the corner from Mr. Cooley's, is that correct?

A Right.

Q Did you ever hear any beatings from Mr. Cooley?

A Hear them?

Q Well, you have testified that you could hear a beating but you couldn't—

A I couldn't see it. I could hear it just about everything going on.

Q How many cells are between yours and Mr. Cooleys?

A It wasn't actually cells. I'd say, if you was counting cells, I say maybe he'd be eight cells over.

Q Yet you are positive when you heard something it was Mr. Cooley's cell, not any of the other eight?

A Let me tell you something about institution life. If you lived just there and you're around them you know them when you hear them.

Q Now, could you answer the question? Did you know that it was Mr. Cooley as opposed to any other gentleman?

A Yes.

Q Did you ever hear the other gentlemen being beaten in those other eight cells?

A Yes, and know who it was.

Q You had—You knew absolutely who it was each time?

A Right.

[177] Q No question?

A If I wasn't sure it was somebody, any one man saying they jumping on so and so, and so and so. It was as simple as that.

Q Now, when Mr. Cooley was taken out after these sheets were burned where were the sheets being burned?

A I assume out the back hall.

Q How far was that from your cell?

A I'd say about eight cells.

Q Eight cells over?

A Right.

Q Eight cells towards Mr. Cooley or away from Mr. Colley from your cell?

A That would be eight cells—If I counted eight cells, evidently must have been two cells away from him.

Q From Mr. Cooley?

A Right.

Q And they were sheets and stuff?

A Yes.

Q How do you know they were sheets?

A You could tell the way paper burns, sheets burn and continue to burn.

* * *

[180] REDIRECT EXAMINATION

BY THE DEFENDANT WALKER:

Q Mr. Wilson, was I, myself, an inmate of Northeast One houseing [sic] unit while you were housed there?

A I believe so.

Q Another question I'd like to ask you is: During the time of the burnings, were any inmates at any time, to your knowledge, allowed to or let out of their cells to escape the burnings or smoke inhalation?

A No.

Q Have you ever heard me, personally complain to any officials concerning smoke inhalation or the need for medical attention?

A Yes.

[181] Q What did you hear, if anything, concerning my complaints, Mr. Wilson?

MR. SCHAARS: Objection as to hearsay.

THE COURT: Well, the defendant said which is over heard by the witness is admissible.

BY THE DEFENDANT WALKER:

Q Would you answer the question, Mr. Wilson. Would you answer the question, Mr. Wilson?

A I heard you say that if they didn't straighten out some of the rules or the jails you were going to file a

writ pertaining to jails, towards the—with respect toward the inmates there.

Q Do you know of any writs of this nature were ever filed?

A I don't know.

Q All right. Where was your cell located in the Northeast One housing unit, Mr. Wilson?

A I was in Cell 37.

Q Cell 37?

A Yes.

Q Is that on the top tier or bottom tier?

A That is the bottom tier.

Q Where was my cell located, if you remember?

A If I remember you must have been over top of me.

Q Umm. Where was my cell in relation to yours?

[182] A I would say you had to be exactly over top of me. If not exactly over top of me you had to be maybe down some, I can't positively remember.

Q From where you were located in reference to where I was located were you able to clearly hear conversations that were going on between myself and anybody that may have been standing in front of my cell or near my cell?

A No, I couldn't hear.

Q All right. The District Attorney asked you were you able to know who would be in—who was being beaten by hearing the voice. I'd like to ask you: Is that just your assumed opinion or could you be absolutely sure by voice alone who was being beaten?

A Yes. If there was a fellow inmate, inmates that I more or less had any dealings with, yeah.

Q Let me ask you this: What other way did you have of determining who was being beaten other than by voice recognition?

A Somebody would just say it.

Q Somebody would just say it?

A Yes. Like if Joe was getting beat, Frank would say: "They're beating Joe."

THE DEFENDANT WALKER: That is all, Mr. Wilson. Thank you.

* * *

[184] BY MR. DRURY:

Q Are there any type of fire-fighting equipment within Northeast One that—

A I guess so.

Q There are?

A Yes, there is some down there.

Q Where are they located, sir?

A Within the officer's booth.

Q They are located in the officer's booth?

A Yes.

Q Now, you were an inmate, were you ever allowed to go in the officer's booth without authorization?

A No.

Q Were you ever let out of your cell to go get a fire-fighting piece of equipment?

A No.

Q Is there any fire-fighting equipment in your cell?

A No.

Q Is there any water in your cell?

A Yes.

Q They have lavatory facilities, is that correct?

[185] A Right.

Q When a fire occurred were any inmates allowed in your experience out of their cells to fight these fires?

A No.

Q Are inmates allowed to have matches?

A Yes.

Q In Northeast One are they allowed to have matches?

A Yes, they are allowed. No, not no more since I was just down there two weeks ago they took all of our matches so evidently they can't keep matches.

Q On August 26th, the day or the night of the escape, were you at D. C. Jail?

A I don't know when the escape took place. I was down in Lorton Youth Center.

Q I see. Thank you.

When a beating occurs is there any information that you receive from other inmates or from the guards?

A Yes.

Q That indicates that a beating is taking place or did occur last night or at some time prior?

A Yes. Like most of the inmates will boo, say "Why don't you let two or three of us out and two or three of us would fight you all." I mean a man on man thing instead of three men taking one man. It would be something like that.

* * * *

[188] MR. SCHAARS: Your Honor, if I may at this time I would ask the Court to require the defendants that they make a proffer as to how they intend to satisfy what at least appears from the Government's point of view to be fairly clear aspect on all the law on duress and necessity that is when one escapes under duress or because of necessity one turns himself in immediately. That does not appear evident in this case in any way, shape or form, and I would respectfully suggest to the Court to pursue this kind of line of defense witnesses only to perhaps revolve in the end in the striking of testimony or eliminating that testimony by way of instruction, because the defense could not establish the last element of duress, is to really waste the time of the Court.

I would suggest that a proffer would be appropriate.

THE COURT: Is Counsel prepared to make a proffer?

MR. DRURY: Your Honor, I speak for my client, Clifton Bailey. I believe that Clifton Bailey's defense is premised on the fact that he was subjected—Court's indulgence. He was subjected to harassment and beatings by jail officials. He made an attempt prior to the escape according to my study of his testimony and my confirmation according to the study of his statements to me and my confirmation of certain aspects of it, I believe that prior to the escape he came back [189] here prepared to testify in the Brad King case. The Brad King case was a case that occurred before Judge Bacon in the Superior Court. He gave testimony and King was ultimately acquitted. He came back to the jail. This was in June or early July. He was not shipped back to the appropriate Federal Institution where he should have been. He was subject to harassment and beatings by the guard officials. As a result of these beatings he filed a suit in Superior Court, which I have been able to cor-

roborate with a certified copy of the complaint and the existence of that suit will be offered as evidence tomorrow.

He has in his possession subpoenas that have been sent out. An answer by Mr. Risher's office that was sent to him on March 2nd of 1977. However, the institution of the suit occurred prior to the escape and it is our contention that this suit is corroborative of attempts to bring to justice the harassment that occurred, the beatings that occurred and I would respectfully oppose any inclusion into the requirements of duress being offered as a defense of this aspect that there must be some reporting to Governmental officials after the man escapes.

I have read the Chapman case very carefully. The Chapman case, as the Court is aware, which was offered by Mr. Schaars earlier today, dealt with an escape from prison and what happened the defendant's testimony concerns his [190] defense, basically, was that he was forced by the other prisoners to leave the custody of the jail, and he went along for the ride so to speak and once outside the confines of the jail and once outside of the "custody" of the other prisoners he decided he made a voluntary decision to leave and he did not go back. That case, very clearly, points out that—and it is a Fifth Circuit case, that there should have been some reporting or attempt to contact the police.

In this case, Your Honor, however we have an issue that is separate from Chapman. We have the case where a man was subjected at least as I believe the evidence will show, subjected to beatings. He made an attempt to rectify those beating through the legal system that we have here in the District of Columbia, was not successful immediately and was subjected to more beatings. Then when the opportunity arose he availed himself of it. He left. He did not go back. He did not go back because of his knowledge, Your Honor, that there was only one institution that you go back to in the District of Columbia. This Clifford Bailey has been in jail since 1972. He has, according to his statement to me, on Monday evening, he has been in dead lock more than three-quarters of the time that he's been in jail since 1972.

Now this neither confirms or disapproves what the Court may feel, and what the prosecutor may feel about Mr. Clifford Bailey's desire for peace and good order. Perhaps [191] he is rowdy when he's in jail, Your Honor, but the issue is that he's been in dead lock. He realized when he got outside of the District of Columbia Jail, after escaping that the only place he was going to go, the only dead lock area in the New D. C. Jail was Northeast One. He would go right back to the area of his captors, to that extent I believe it is distinguishable from Chapman. I believe that any inclusion, Your Honor—

THE COURT: Well, Court processes do not limit the Plaintiff to return to the same institution where he may have been confined. I have many times had the experience of directing that an individual be confined at some other jail.

MR. DRURY: That is correct.

THE COURT: So, I don't know what type of suit he filed or whether the prayers for relief were monetary in character or whether they sought injunctive relief. I haven't seen the suit, but at this time I will not preclude the presentation of evidentiary material, but I warn you this is one of the elements: Turn oneself in or the equivalent at least, notify the authorities where you are and seek relief by seeking the opportunity of being confined at some other institution. That is something you can think about.

MR. DRURY: Your Honor, I would point out at this time, at least for Clifford Bailey, that I have not been informed of any evidence of that nature.

[192] THE COURT: All right.

Let's proceed. Bring in the jury.

* * * *

[194] LESTER DELANE ROBINSON

was called as a witness by and on behalf of the defendant, Ralph Walker, and after having been duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY THE DEFENDANT WALKER:

Q Mr. Robinson, would you state your full name, please?

A Lester Delane Robinson, Assistant Administrator of Operations, Lieutenant, Second Duty.

Q Where are you presently employed?

A New Detention Center.

Q What is your official capacity or function at the Detention Facility?

[195] A Assistant Administrator for Operations.

Q Would you give us a brief summary of what your functions entail?

A My functions entail the overall day to day activity of the D. C. Jail as far as security and housing, recreation, meals are concerned.

Q The overall, what?

A Function and operation of the D. C. Jail, D. C. Detention Center in areas of security, housing, clothing, feeding is concerned.

Q Thank you. Do you have any immediate staff working under your direct supervision?

A Major William Long is my immediate subordinate, and all of the correctional staff.

Q Approximately how many persons do you feel comes under your direct supervision?

A About 360.

* * * *

[203] Did you on any occasion between July 11th and August 26th receive orally, or otherwise any records of any burnings in the Northeast One housing unit?

A Yes, I did, Mr. Walker.

Q All right. Did you on any occasion between July 11, and August 26th receive orally or otherwise any reports of any physical beatings in the Northeast One housing unit by official personnel?

A No, I didn't, Mr. Walker.

Q Umm. Did you on any occasion between July 11th and August 26th received orally or otherwise any reports

of any physical restraints on inmates by correctional officials?

[204] A Oh, yes, I did.

Q How many, or how frequently were these reports received by you if you can answer that as far as the burnings are concerned?

A Well, all of the burnings were put in memo form and that should be a matter for the record.

The restraints used on residents were mostly put in memo form and should be a matter of record.

I can't give you an answer as to the exact number.

* * *

[206] THE COURT: Were you aware of the fact or the allegation that when there were fires the officers left and allowed the fires to burn themselves out?

THE WITNESS: No, sir.

THE COURT: All right.

BY THE DEFENDANT WALKER:

Q Were you aware of the—were you aware of the magnitude or of how terminal the situation in Northeast One had become as a result of the fires, how terminal?

A Mr. Walker, I was aware of some problems in Northeast One due to inmates setting fires.

Q But you weren't aware—

A If that answers your question.

Q That doesn't answer my question.

Were you aware of how terminal the situation there had become?

THE COURT: That is argumentative. He can state the degree of his awareness.

[207] THE DEFENDANT WALKER: All righty.

BY THE DEFENDANT WALKER:

Q Did you receive any written reports or petitions from the inmates of Northeast One complaining about the terminal situation that existed in Northeast One?

A I received a petition, I think, from the inmates in Northeast One.

Q All right.

A But I also received some petitions from other inmates in other housing that pertains to other matters.

Q That is not the question.

A Okay.

Q The question: Did you receive petitions from inmates in Northeast One complaining about the conditions that existed there concerning the fires?

A I would think that I had received petitions. Let me put it this way: I can't state for certain that I received one. I think I did.

Q Okay. Thank you. Now, what did you personally do, if anything to bringing an end to the beatings and burnings and smoke inhalations being suffered almost daily?

MR. SCHAARS: Your Honor—

THE COURT: You may rephrase that. Take up one subject at a time.

BY THE DEFENDANT WALKER:

[208] Q What did you do, personally, if anything toward bringing an end to the beatings that you had received reports of?

A I didn't get—

MR. SCHAARS: Your Honor—

THE WITNESS: —petitions stating that anyone had been beat, Mr. Walker.

BY THE DEFENDANT WALKER:

Q And the same question in reference to the burnings.

A I didn't get a petition stating they had been burned. I got a memorandum from my supervisor stating that residents had set fires in Northeast One.

Q Did you, personally, do anything concerning the conditions there?

A Yes. I referred it to Major Long.

Q You referred me to Major Long?

A I referred the petitions—the memorandum back to Major Long,—

Q So, in other words—

A —for corrective action.

Q So if I was to find out what type of corrective action was actually taken I would have to question Major Long?

A Not necessarily. As far as the fires are concerned I also put the fires out and cleaned the place up.

[209] Q The officers did put the fires out?

A Yes.

Q Was that something that you received in a report?

A Yes.

Q From the officers.

Did you check into it to see the validity, the authenticity of the reports as far as the officers putting the fires out?

A Yes, sir, to my satisfaction I am certain the officers put the fires out.

Q That will be all, Mr. Robinson, thank you.

* * * * *

[CROSS EXAMINATION]

[BY MR. DRURY]:

[225] Q Were you aware of any complaints that my client, Clifford Bailey, made against any specific officers on Northeast One during June, July and August?

A In reference to what, sir?

Q In reference to beatings.

A No, sir, I am not aware of any complaint Mr. Bailey made in reference to a beating.

Q Are you aware of any complaint that Clifford Bailey has ever made?

A Mr. Bailey has made a lot of complaints.

Q In fact he's complained so much that he's filed a suit in Superior Court, hasn't he?

A We could never—

Q Answer my question.

A I don't know about the civil suit he's filed.

Q You are not aware of any suit?

A I am not aware of it.

[226] Q Are you aware of an Officer Graves?

A We have two Officer Graves, yes, sir.

Q Are you aware of an Officer Graves that works on Northeast One?

A We don't have an Officer Graves, I don't believe that works at Northeast One at this time.

Q June, July or August, are you aware of an Officer Graves that worked in Northeast One?

A We have 360 officers. I don't know where all of the officers work on all three shifts. I'm not denying that he did work there when I wasn't aware of it.

Q Did you ever have an Officer Graves that worked in Northeast One?

MR. SCHAARS: Objection, Your Honor. He has answered the question three times.

THE COURT: Yes. Sustained.

BY MR. DRURY:

Q Have you ever been served with a subpoena in a case now pending in Superior Court by any U.S. Marshal?

MR. SCHAARS: Objection, Your Honor.

THE COURT: Too broad.

BY MR. DRURY:

Q Have you ever been served with a United States—strike that.

Have you ever been served with a subpoena by a U.S. Marshal in the case of Clifford Bailey v. The District of Columbia?

A I don't know, sir.

Q You don't know?

A I don't know.

Q Well, would you personally receive a subpoena at your office if one was served upon jail officials?

A Let me explain it this way:

I have been served with a number of subpoenas for a number of years for different reasons, and in my position I get served with a subpoena quite frequently.

THE DEPUTY CLERK: Defendant Bailey No. 4 marked for identification.

(Whereupon, Defendant Bailey's Exhibit No. 4 was marked for identification.)

THE COURT: This will not be regarded as legal service, Mr. Drury, if that is what you are seeking to do.

MR. DRURY: Thank you, Your Honor.

BY MR. DRURY:

Q I'm going to show you what has been marked as Defendant's Exhibit No. 4 for identification and ask you whether you know what that document is, whether you can identify it, sir.

A This is a marshal receipt for return of service.

[228] Q Who is the service to have been directed upon, sir?

A Mr. Robinson.

Q Lester Robinson.

Is there a name on the bottom of that, sir?

A Where, on the bottom, sir?

Q Is there a signature in writing?

A There is a Marshal's signature.

Q Can you read it, sir?

A No, sir, I can't.

Q And is there a notation that has been made on that document that personal service has been made on you?

A I see it is personal service.

Q It says: "p-e-r-s- period, service," doesn't it?

A Yes.

* * *

[230] BY MR. DRURY:

Q Now, do you have any familiarity with the complaints by my client concerning an attack that was made by an Officer Graves on him during June, July or August?

A 1976?

Q 1976, yes, sir.

A Maybe, yes.

Q Who brought it to your attention?

A I think it was brought to my attention by the administrative assistant to the superintendent.

Q Who would that be?

A That was Mr. Viss. That was about two months ago. The complaint was not made in June, July or August of 1976. It was made a couple of months ago to my knowledge.

* * *

[235] Q Mr. Walker-El asked you about fires that occurred in the Northeast One sector. Who caused these fires, sir?

[236] A The residents set the fires.

Q What material was used to set these fires?

A Sheets, pillow cases. In some cases mattresses, personal items of institution clothing, shirts, underwear, blue denim.

Q Would these fires be confined to a particular cell or would the items of burning material be thrown out into the hallway?

A They would be thrown out into the block and hallway. No one wants to keep the fire in the cell.

Q What is the procedure that you or the Department of Corrections has laid down for the putting out of these fires? Who is to do it, the inmates or the officers?

A No, sir. That is why some of them set fires to get out of the cell. We have officers put out the fires. We turn the smoke exhaust fans on. We take anybody to the hospital that the MTA, which is a medical technician who comes down to examine them to see if they need to go to the hospital, quite frequently.

* * *

[239] Q Are you personally aware from any source of information that comes into your possession that Clifford Bailey was the subject of threats by guards under your supervision or in the District of Columbia Jail complex?

A No, sir.

Q Has Mr. Bailey ever complained to you about these threats?

A Yes, sir.

Q So that you are aware?

A I am aware that inmate complained.

Q On more than one occasion?

A Yes.

Q To more than one individual?

A To me and most to the Adjustment Committee.

Q Prior to his escape?

A I don't know whether it was prior or after. I don't know.

Q When did he go before the Adjustment Committee after his arrest on November 19, 1976?

[240] A I can't tell you the date, but Mr. Bailey—

Q Was he before the Adjustment Committee subsequent to November 19, 1976?

A Oh, yes, on a number of times. As a matter of fact I think I saw Mr. Bailey two, three weeks ago.

Q How many times has he complained to you, sir?

A It depends. He complains about different things. Sometimes wants you to call Glendale Hospital. Sometimes he wants to call one of the hospitals or St. Elizabeths or some place.

Q My question to you really was, sir: How many times has he been before the Adjustment Board?

A I can't tell you how many times he's been before the Board.

Q How many times have you, personally known that he has complained to you about threats to do bodily harm to him by jail officials?

A I don't know.

Q More than once, though?

A Oh, yes.

Q Quite possibly before his escape, is that correct?

A Quite possibly correct.

Q Of course that would be contained in the documents that you keep?

MR. SCHAARS: I must object. The documents have [241] been subpoenaed. This gentleman has indicated again and again he's not intimately familiar with the documents. If the defense wants the documents they are being subpoenaed. They can cross-examine the witness from them. This is just belaboring—

THE COURT: Sustained.

BY MR. DRURY:

Q Have you ever made out any form or put your name to any form acknowledging existence that shows that my client complained to you about threats?

A Mr. Bailey comes up before the Adjustment Committee.

Q My question is very simple.

MR. SCHAARS: May the witness be permitted to answer the question.

THE COURT: Usually we follow that rule even in cases you prosecuted before this court, Mr. Drury.

MR. DRURY: I'm sorry.

THE WITNESS: The results of the action at the Adjustment Board is kept by recorder.

BY MR. DRURY:

Q On tape?

A On a tape, by an officer who does the recording.

Q You keep a series of notes for every adjustment hearing?

A Yes.

[242] Q I'm sorry. You do or—

A The recorder keeps them.

Q And these notes would be in the possession of the D.C. Jail officials and the tapes would be also?

A We don't have any tapes.

Q Transcript like this lady is—

A No, we don't have that. We don't have that much money. We keep notes. We make a summary from the notes.

Q In his complaints to you prior to the escape, did he accuse any officer of, any specific officer of making threats to him?

A He might have. I don't remember.

Q You do not recall whether an officer under your supervision threatened to do bodily harm to my man?

MR. SCHAARS: That is exactly what Mr. Robinson just said.

THE COURT: We are going to get these reports.

MR. DRURY: Thank you.

BY MR. DRURY:

Q Sir, do you consider as a supervisor that such a complaint of a threat directed against an inmate by a guard is a matter of such significance that it deserves investigation?

A That is true, sir.

Q And at your direction was any investigation ever [243] made of these threats directed against my client?

MR. SCHAARS: Objection, Your Honor. The alleged threats. Mr. Drury is drawing conclusions again and again. He is arguing stuff that isn't in evidence.

THE COURT: That is correct. Objection sustained.
MR. DRURY: I will rephrase the question.

BY MR. DRURY:

Q Was any investigation directed to determine the validity of these threats, alleged threats?

A Every allegation Mr. Bailey has ever made has been investigated, has been filed, we felt without foundation, totally without foundation.

Q Of course every investigation that is conducted—

A Yes.

Q —is memorialized on paper, is that correct?

A I didn't say that, no.

Q Are the investigations that concerned the threats made against—the alleged threats made against my client put in memorandum form?

A Some are, some aren't. Some are so frivolous we don't bother to put in memorandum form.

MR. DRURY: Court's indulgence, please.

THE COURT: Yes.

MR. DRURY: Your Honor, with the Court's permission may I suspend my questioning of Mr. Robinson until I have— [244] I am in receipt of the records?

THE COURT: The Court has been suggesting that to you for the last half hour, Mr. Drury. I'm glad you got the word.

MR. ARMSTRONG: Would the Court allow me to talk to Mr. Drury and Mr. Schaars for a moment?

THE COURT: Yes.

MR. ARMSTRONG: Thank you, Your Honor.

Mr. Walker, why don't you join us.

THE COURT: All right, Mr. Robbins.

CROSS-EXAMINATION

BY MR. ROBBINS:

Q Mr. Robinson, correct be if I'm wrong, but your testimony was that a man could be on Northeast One,

maximum security because he was considered incorrigible and that he would be considered incorrigible if a complaint was filed by the shift supervisor. Is that not correct?

A No, I didn't say a complaint. I said a shift supervisor would—could place the man on dead lock status and an incidental report which would then go to the Adjustment Board—

Q But—

A —for clarification.

Q —he would first be placed on dead lock before he appears at the Adjustment Board?

[245] A That is true.

Q And thereafter he, as long as he was on dead lock he would go before that Adjustment Board every fourteen days?

A Every fourteen days, yes.

Q Now, during the summer months of 1976 do you know where Mr. Cooley was housed?

A I believe Mr. Cooley was in Northeast One.

Q So during the summer months he would have come before the Adjustment Board every fourteen days?

A He would be summonsed before the Adjustment Board every fourteen days. Some people refuse to come. We don't force them.

Q Do you personally remember seeing him during those summer months?

A I have seen Mr. Cooley before, yes.

Q During those visits to the Adjustment Board would he ever make any complaints about his treatment in the jail?

A I don't believe Mr. Cooley ever complained to me about anything except getting off of dead lock.

Q How long would these visits to the Board last?

A Well, we are talking about whatever he had on his mind, his complaints were. Some of them—Depending on the person were up to ten to twenty minutes.

Q Do you recall how long an average visit with Mr. Cooley would last?

[246] A No. They were pretty short. As I say, Mr. Cooley, he really didn't have anything to complain about, didn't make any complaints to me.

Q All of the times he was before you he never made a complaint about physical abuse?

A No. He just wanted to know when he was going to get off dead lock.

Q Did you ever notice any physical injuries on Mr. Cooley?

A None.

Q Not during the entire summer.

A Not during the entire summer.

Q If he did make any complaints would there be a record of that?

A If he made any complaints then there may be in the records of the minutes of the Adjustment Board proceedings.

* * *

[248] CROSS-EXAMINATION

BY MR. SCHAARS:

Q Good afternoon, Mr. Robinson.

* * *

[252] Q Can you estimate the number of petitions from inmates that you have received in the last three months, let's say?

A Well, are we talking about petitions now or subpoenas?

Q Petitions, just signed petitions from the inmates.

A Well, we really haven't received many petitions. We have received some. Petitions sometimes asking for [253] certain items that are not sold in the canteen. If we get enough people asking for them maybe we will order a dozen Kools, we will ask the Canteen manager if they have them. That is one type of petition. The other petition will be to ask if they would be allowed to watch t.v. after 11:30. Sometimes we get petitions that will complain about, maybe the lack of certain items on the menu, pancakes for instance, which we used to serve in the old days. We don't serve in this jail, we just don't do it. So, those are the type of petitions that I'm talking about.

Q Do you ever comply with the request of the inmates who give you petitions? Do you ever attempt to satisfy the petition they are seeking?

A If it doesn't involve security and can be handled we do it.

* * *

[254] Q Now, Mr. Drury repeatedly characterized the guards and the correctional officers within your institution as having attacked inmates. Have you ever, as a result of your investigation of any inmate complaint—let me rephrase that.

With any complaint from any of these three gentlemen, Mr. Cooley, Mr. Bailey, Mr. Walker-El, determined that a [255] guard attacked one of these gentlemen?

A No, sir. There has never been any proven fact, any instance where this could have happened, where an officer attacked one of these gentlemen here.

Q Now, if one of these gentlemen indicated that he had been attacked what if anything would you do to determine whether or not that allegation or charge had some substance to it?

A Well, what we do is we call in the shift supervisor and given an assessment of what we have and ask him to make his own investigation first and take whatever action is appropriate. We try to be fair about this. I know we are fair, but we have not found any instance where either one of these young men were attacked by any one. It has been the other way around in most cases.

Q In fact in all cases that you have determined it has been them attacking guards or other inmates?

A That is true.

Q Isn't it in fact that in the case of one of the defendants he broke the jaw of another inmate?

A I think, yes.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Cr. No. 76-735-4

UNITED STATES OF AMERICA

v.

CLIFFORD BAILEY, DEFENDANT
RONALD COOLEY, DEFENDANT
RALPH WALKER, DEFENDANT

Washington, D.C.
March 10, 1977

The above-entitled matter came on for further trial in open court at 9:45 o'clock, A.M., before:

THE HONORABLE OLIVER GASCH
United States District Judge, and a Jury.

* * * *

[269] [MR. SCHAARS:] The second thing I would like to raise this morning is to renew my request for a proffer from these gentlemen as to what they intend to do with regard to the last element in the defense of duress. That is, the turning of themselves in. Mr. Bailey has indicated through counsel that he did not do that. He did not turn himself in. We have yet to hear from [270] Mr. Walker whether he turned himself in or whether Mr. Cooley as to whether he turned himself in.

I suggest to the Court that given time this trial is taking to try that a proffer might be appropriate, otherwise I would suggest we are simply wasting the Court's and the jury's time in going through all of this evidence.

THE COURT: What about the issue just raised by Government counsel?

MR. DRURY: Your Honor, yesterday afternoon I had the opportunity to spend some time in the library to research on the cases that the Court noted in the Government memorandum of law submitted by Mr. Schaars on the opening day of trial.

I read the Joiner case, the Woodring case, the Coggin case, and the Miller case, Your Honor. I believe that each case is distinguishable on its facts from the case that we have here, and—

THE COURT: Do you recognize there is an obligation of a defendant who seeks to utilize this defense to turn himself in or make his presence known to the authorities.

MR. DRURY: Your Honor, I do not believe that element that the Court and that the Government have called attention to is a necessary element.

THE COURT: Do you have any authority to support your position?

MR. DRURY: Your Honor, I believe that the Woodring [271] case, if I might merely explain what I—the jist [*sic*] of my argument. The Woodring case involved a defendant who was on a two-day furlough. He was let out to attend some divorce proceedings, and he was arrested for a traffic offense sometime later, and he is—his defense was, and it was uncontradicted, that he had an epileptic fit which was caused by the shock of the divorce proceedings, and this triggered the seizure, the epileptic seizure. It left him confused and affected his memory. However, the Court pointed out that there was an obligation on the part of the defendant to turn himself in and pointed out that certain, that the defendant was capable of remembering certain incidents that occurred during his fugitivity, and he was able to respond clearly to questions that were directed by the officer at the time of the arrest.

I would also point out that at that time he had in his possession a false driver's license and registration and the Court felt that since this man was on a furlough, and that since he claimed an epileptic seizure, which can be properly termed an involuntary incident that caused his failure to return to the institution, I believe that the issue of failure to report—the Court recognized as something necessary to this particular fact situation. Now, as the Court is well aware in this situation as I argued yesterday afternoon, after lunch, we have here a man who left the jail because he could not rely on his captors or the guards to adequately [272] respond to his com-

plaint that had been made. Now, turning to the Woodring case. The Woodring case concerned an escapee from an honor farm, a federal honor farm, and the facts in that case are highly amusing to read. In the defendant's testimony is that he was watching the movie one evening at the honor farm when he was tapped by, on his shoulder by someone.

THE COURT: I recall the facts.

MR. DRURY: And the stranger took him away from the jail and pointed a gun at him, that he was forced to remove himself from the jail. He was gone for 19 months, Your Honor, and the Court termed it a voluntary abduction. Now, there the Court said that they felt the man should have made an attempt to contact the prison authorities and turn himself in in the sense that he was voluntarily abducted. In the Miller case, it was actually a bail jumping case where a man was let out on bail and failed to show up for trial and the reason was given that he feared bodily harm. The judge said that—the judge at the trial level said that even if it were true, there would be no defense at law. I quote, "Especially since the defendant failed to tender himself to the authorities or otherwise ask that any protective measures be taken for his safety prior to fleeing the jurisdiction," here we have a man who is outside of the criminal justice system with the one tentacle that he's on bail. He fails to return to trial. He states as his [273] defense that he's threatened by someone on the outside if he did return he would be subjected to bodily harm.

There, the Court's reasoning was that he had an obligation to at least alert the police, that these threats were occurring.

The Coggins case, which incidentally concerns a fugitivity in Virginia of a D.C. resident who was incarcerated at Lorton, concerned a one-day furlough and the defendant contends that he did not return from the furlough, however that he called and there is evidence in the record of that case that he called the District of Columbia and was personally instructed on the phone to return to Lorton. He failed to return, Your Honor, and the Court said that clearly, the willfulness of the action

when he did not return, when he did not turn himself in, was an indication that indeed the defense was not substantive.

Here, Your Honor, we have an entirely different case. I would assert and submit that the Courts of Appeals in the Fourth Circuit and Tenth Circuit and Ninth Circuit have added this extra element to the facts of the case. It is not a necessary element to be included in these facts. Duress is a proper defense. Judge Bazelon, makes no mention of this extra element that the Government has asserted should be included in here. Judge Bazelon does not refer to that. I would submit, Your Honor, that it is not an appropriate—

THE COURT: I don't think that was before Judge [274] Bazelon. You're talking about Judge Smith's case.

MR. DRURY: Your Honor, yes, I am sorry, but I believe that—

THE COURT: There were no findings and conclusions in that that is the reason it was referred back to Judge Smith. When the findings and conclusions were made the conviction was affirmed.

MR. DRURY: Yes, Your Honor. I believe that the case, the ruling of Snow is dicta. I will concede to the Court, but I believe it is such that can be interpreted.

THE COURT: It is the position of the Court that when the defense of duress is asserted and when one escapes from custody, one has the obligation of making his presence known or turning himself in. These men did neither according to what I have heard so far. Now, I haven't heard all of the evidence—

THE DEFENDANT WALKER: That's right.

MR. DRURY: Your Honor, would the Court rule that way even though—

THE COURT: If there is no stated reason why these men didn't turn themselves in or make their presence known, I don't think the defense of duress will avail them.

MR. DRURY: Even if it can be shown that my client was frustrated in failure to have the proper authorities hear his complaint prior to his escape?

THE COURT: I think he has the obligation of making [275] his presence known. He can't unilaterally

take the law into his own hands, break out of jail and then hide.

MR. DRURY: Your Honor, I would submit that the crime occurs at the time that the exit from the jail happens and that the indictment here states that the escape and that the crime occurred at that time, and any action subsequent—

THE COURT: I would agree with you, but you have asserted the defense of duress. I am simply pointing out to you by way of information to the defense counsel and the defendant who is proceeding pro se, with the assistance of Mr. Armstrong, that that is something that must be shown to avail themselves in this defense. All right, bring in the jury.

* * *

[296] FURTHER CROSS-EXAMINATION

BY MR. ROBBINS:

Q Mr. Robinson, do you recall yesterday afternoon being served with a subpoena by me?

A Yes, sir.

Q What did that subpoena request you to bring to court today? You can look at your notes if that would refresh your recollection.

A Records of the Adjustment Board concerning any meeting with actions taken concerning Mr. Ronald Clifton Cooley, during July and August of 1976.

Q Did you bring those requested records here to court today?

A I think we completed it.

* * *

[302] Q Now, Mr. Robinson, did these represent the complete records of the Adjustment Board during July and August of 1976 as concerned Mr. Cooley?

A To the best of my knowledge, yes, sir.

Q And all of these records indicate if I am correct, that he was present and that you were present at least three times and the reason why he was present?

A Mr. Cooley chose on some occasions not to appear before the Board for review.

Q My question is: That that is all they indicate as to Mr. Cooley, that he was present, that you were present and the reason for his presence?

A Mr. Cooley chose at certain times not to appear before [303] the Board. On some of these dates he would not necessarily be present of his own choosing. I don't know whether he was present or not on certain dates here.

Q So, his name being on the list does not mean that he is there?

A That is correct.

Q And, there is nothing to indicate at all whether he made any complaints to you or to any members of the Board even if he were there?

A That is correct, sir.

Q So, the only record of complaints that he would make that you would know of would be from your own recollection?

A That is correct, or in writing.

Q And at many of those meetings you saw ten or more men, is that not correct?

A That is correct, sir.

MR. ROBBINS: I have nothing further, Your Honor.

* * *

[305] BY THE DEFENDANT WALKER:

Q Mr. Robinson, would you tell the Court exactly what this is that has been marked Defendant's Exhibit Number 1, please, this book?

A This is a log book that was kept on Northeast 1 for this period of time.

Q It is a log book that is kept in the Northeast 1 housing unit?

A Northeast 1 housing unit.

Q Now, this log book that is kept, will you briefly explain to the Court what it entails, what it incorporates, what is kept in this log book?

A The log book of Northeast 1 should show time of relief and time of going off duty and all of the pertinent details.

Q All of the pertinent details?

A That happened during an officer's tour of duty.

Q Whose responsibility is it to write or report in or through this log book?

A Officers on duty.

Q Yesterday you testified that you read a log book or you read brief summaries of what is in a log book each morning, five days a week. Does this entail what you read or is this what you read daily?

A I didn't testify to that, Mr. Walker. I said I read [306] each morning shift supervisor's reports, which is this item here.

MR. SCHAARS: Your Honor, perhaps we could have that marked if that pertains to this time period that Mr. Robinson can refer to it.

THE DEPUTY CLERK: I will mark that as Walker Exhibit Number 1A.

(Whereupon, Defendant Walker's Exhibit Number 1A was marked for identification.)

BY THE DEFENDANT WALKER:

Q Now, would the supervisor's report that you read every morning have a summary of what went on in the log book that day?

A The supervisory report would be a condensation of the pertinent details that happened in the institution, including Northeast 1.

Q Who is the supervisor, who was considered as a supervisor?

A The ranking person on duty on that shift. It is normally a captain or lieutenant in his absence.

Q Do you ever, in your capacity as an assistant administrator, read this particular log book that comes out of Northeast 1?

A If I am in Northeast 1 I will check the log book, but we don't normally bring the log book out of the housing unit.

[307] Q Does any of your supervisors that are immediately under you—I'm referring to who made this, the captains, do they read this log book periodically?

A They are required to read the log book periodically the same way that I read it. We do not bring it out of

the housing unit. We visit the housing unit and we check the log book.

Q So, if incidents occur in a housing unit and it is recorded here, what other way is it for the employees that work on an administrative level to know that these incidents are taking place in the block?

A Anything that is important enough to record in the book, as far as incidents are concerned, officers are required to notify supervisors. Supervisors will write an incidental report and take whatever correctional action needed to be taken at that point. The incidental report would come up through the chain to the superintendent.

Q All right. I notice in the book it has Watch 1, Watch 2 and Watch 3. What does Watch 1, Watch 2 and Watch 3 signify?

A Okay. Watch 1 is shift 1 which is the tour of duty from 11:30 p.m. until 8:00 a.m. in the morning.

Watch 2, shift duty, 7:30 in the morning until 4:00 o'clock in the afternoon.

Watch 3 is shift 3, the tour of duty from 3:30 p.m. [308] in the afternoon until 12:00 o'clock at night.

Q Now, these records are kept by the senior officer in the block?

A The senior officer should keep it. If he is not in the booth then the officer in the booth keeps it. The senior officer does not stay in the booth for eight hours.

Q In other words, before each shift goes off he is required to make some type of report of the pertinent things that happened in the block?

A That is true, if there is a pertinent happening. If nothing happens over there he may just indicate when he came on, the number of keys he received and number of inmates in the housing unit.

Q Mr. Robinson, calling your attention to Watch 1 on 8-10-76, do you see any indication here where Officer Lessington, or Captain Ellis reported fires or said any fires were burning in the block?

A It indicates here that on 8-10-76 on Watch 1, that is the shift from 11:30 p.m. until 8:00 a.m., that Officer Lessington received a status report from the

officer he relieved that there had been some fires in Northeast 1.

Q Would you read the contents of this, please?

THE COURT: Is this in evidence?

THE DEPUTY CLERK: No.

MR. SCHAARS: It hasn't been moved in yet, Your Honor.

[309] THE COURT: Do you wish to move it into evidence?

THE DEFENDANT WALKER: Yes, I would like to move it in evidence.

THE COURT: Now, I take it this is a record kept in the ordinary course of business—

THE WITNESS: Yes.

THE COURT: —required to be kept and—

THE WITNESS: Yes.

THE COURT: —and entries are contemporaneously made?

In view of that, do you wish to be heard further?

MR. SCHAARS: No your Honor. Just one request I would like to make is that we be permitted to make xerox copies of all of the documents so that the book may be returned to its proper place.

THE DEFENDANT WALKER: Before we proceed?

THE COURT: No, you may proceed, but the original record will be returned to the institution and xerox copies will be made of the pertinent portions.

BY THE DEFENDANT WALKER:

Q Mr. Robinson, just this brief section, from here to here please.

THE DEPUTY CLERK: Is that 1 or 1A?

THE DEFENDANT WALKER: 1 and 1A.

THE DEPUTY CLERK: 1 and 1A received in evidence.

[310] (Whereupon, Defendant Walker's Exhibit Numbers 1 and 1A were received in evidence.)

THE COURT: All right, now you may ask him to read it.

BY THE DEFENDANT WALKER:

Q Would you read it, please, Mr. Robinson?

A On 8-10-76, 11:45 p.m., Officer Lessington came on duty. 1:50 p.m., Officer Lessington called Captain Ellis. Some of this I can't make out. Received the water and garbage, setting fires, throwing soap, when my second officer came seventy-nine people—

Q That is sufficient. May I indulge the Court for one minute, Your Honor?

THE COURT: Yes, the Court will indulge you for a minute.

THE DEFENDANT WALKER: Your Honor, do I understand from the ruling that this whole book is in evidence?

THE COURT: The ruling of the Court is that the book is accepted in evidence as a record kept in the regular course of business, however, it will be removed and returned to the institution and the pertinent portions will be photocopied and that will constitute the record in this case.

THE DEFENDANT WALKER: Thank you, Your Honor.

THE COURT: All right.

BY DEFENDANT WALKER:

[311] Q So, there was a fire and throwing garbage on 8-10-76, according to the records of this—

A According to the record.

Q Now, I'd like to move to 8-11-76, which was the next day and I'd like to direct your attention to Watch 1, I think that was signed by Mr. Fogg, and I would ask you to read that.

A Okay, Watch 1 on 8-11-76, Officer Clements, and Officer Fogg—

MR. DRURY: Your Honor, with the Court's indulgence, could the microphone be moved over.

THE COURT: All right.

THE WITNESS: 8-11-76, Watch Number 1, Officer Clements, Sanders and Fogg, secured. 12:00 o'clock count 76 residents. Unit is dirty with trash, food and burned clothing on all tiers.

BY THE DEFENDANT WALKER:

Q So, from this, Mr. Robinson, it indicates that there was burning on this date, also?

A That is the—

Q On 8-11-76, according to the record?

A That is true.

Q The next date we would like to move to is 8-16-76.

THE DEPUTY CLERK: That page hasn't been marked yet.

THE COURT: Well, the whole book will be in evidence. Mark the pages as you go along.

[312] THE DEFENDANT WALKER: That is what I indulged the attorney about.

THE COURT: Mr. Patterson will help you. Let him assist you.

THE DEFENDANT WALKER: Okay.

THE DEPUTY CLERK: This is Walker's 1-B, Your Honor.

THE COURT: All right.

(Whereupon, Defendant Walker's Exhibit Number 1-B was marked for identification.)

BY THE DEFENDANT WALKER:

Q All right, Mr. Robinson, I direct you to Defendant's Exhibit 1-B, at 8-16-76, and I ask you to read the section from 7:50 a.m. in the morning.

A This is Watch 2 on 8-16-76, 7:50 a.m. Believe number one count, 74. Unit is fouled up. Burning trash, water and sodas on floors. Second watch refused to take unit until ordered by Lieutenant Feidler. Informed by Number 1 watch detail refused to enter unit and Number 1 watch had to feed inmates. Officer Bimbo called and said that he would get some men to clean unit.

Q Now, at the top of the page, Mr. Robinson, you read what I asked you to read as Defendant's Exhibit 1, you read that: "Believe Number 1 watch, count 74, unit fouled up."

Is that what this reads?

[313] MR. SCHAARS: There is no doubt, but there is a bit of profanity there. I think Mr. Robinson is trying

to avoid putting that into the record. There is a bit of profanity put into quotes, if Mr. Walker wants to read it, let him read it. It is his exhibit.

THE COURT: Do you wish to read it, Mr. Walker?

THE DEFENDANT WALKER: Yes, I will read it. The language that is used in this particular exhibit, I think it shows—

THE COURT: Not what you think it shows, just read the language if you wish.

THE DEFENDANT WALKER: It says the unit is "fucked up." That burning trash, water et cetera is on floors.

Now, I would like to direct your attention to Watch 2 on 8-17-76, the next day and ask you to read that, Mr. Robinson.

THE WITNESS: Okay. 7:50 a.m., 8-17-76, unit still "fucked up". Count 72. Lieutenant Feidler present in Southeast 1.

BY THE DEFENDANT WALKER:

Q F-d up?

A Lieutenant Feidler left Southeast 1.

Q To avoid the use of profanity at the trial in respect to the people that are here, F-d up is what I had referred to a moment ago.

[314] THE COURT: All right.

BY THE DEFENDANT WALKER:

Q Now, on 8-18, which was two days later, Mr. Robinson, which is here on Watch 2, would you please read that section for us?

A 8-18-76, Number 2 watch, 7:50 a.m., unit still F-d up. Count 76. 11:25, Captain Lee in unit. 11:30—

Q You didn't read this part right here, Mr. Robinson. "No relief in sight."

A One razor and no relief in sight.

Q Thank you. That will be all from Mr. Walker.

THE COURT: Mr. Drury?

MR. DRURY: Just a few short questions.

FURTHER CROSS-EXAMINATION

BY MR. DRURY:

Q Mr. Robinson, in reference to the day of August 13, 1976, there is a notation—

THE COURT: Now, Mr. Drury, Mr. Patterson will mark that page since we are going to duplicate pages to be utilized that will be marked.

MR. DRURY: Let me move on, I will not attempt to mark all of the incidents in here. I will refer to very briefly, the incidents that Mr. Walker-El had referred to.

Directing your attention to Defendant's Exhibit 1-B, Mr. Ralph Walker—in reference to the Watch Number 1, which [315] you read into the record, can you determine who wrote that entry, is there a signature on it?

A There is the officer's. One is Mr. Schneider. I don't know who made the entry.

Q But, one of the officers. Their names, Burton, Burgess and Schneider, appear, is that correct?

A That is correct.

Q That is on August 16, 1976; as you proceed down, there is another entry on August 17th, 1976 where the names are—it appears to be Burton and Schneider, right?

A That is right.

Q And the first entry at 7:50, is it correct to say that the writing appears the same on both the 7:50 entry and—

A I would say the writing appears to be the same.

Q And, is there also referring down here to the entry on August 18th, which is all on that one page, Your Honor, is there not also signatures after that and is the entry still the same. Does the writing still appear to be the same?

A The writing from the entries appear to be the same ones.

Q For at least three days, is that it? Is it fair for you to say that the same officer reported each and every time?

MR. SCHAARS: Your Honor, I object at this point. He has indicated that his experience as a layman they

appear to be the same. Mr. Robinson isn't an expert in handwriting. [316] The items are already in evidence. It is absolutely immaterial who wrote it.

MR. DRURY: I withdraw the question.

BY MR. DRURY:

Q Mr. Robinson, do I take it from the entries on this book that you were aware of this mutinous situation on the part of the operator—

MR. SCHAARS: Objection. It doesn't say "mutinous."

THE COURT: Of the situation, you may rephrase the question.

BY MR. DRURY:

Q Were you aware of the situation on Northeast 1?

A Yes, sir, I was well aware of the situation on Northeast 1.

Q And it was a problem of significant magnitude, was it not?

A Northeast 1 was a problem.

Q Any question during August 16, August 17 and August 18th that this was an incident of sufficient magnitude to warrant your immediate attention?

A Yes, sir.

Q And, of course, as soon as you were aware of this you went to Northeast 1 to attempt to straighten out any difficulties that your employees might have about working on Northeast 1, didn't you?

[317] A No, I did not.

Q Did you consider the action by Watch Number 2, whoever that involved—

A Right.

Q —did you consider that action, their refusal to go on to Northeast 1 and to assume their duties that day, did you consider that a violation of their employment?

A I—no, it is not a violation of the employment. An officer can refuse to take a post if the post is not in order.

Q Mr. Robinson, I note that there are people—that the correctional officers are referred to as officers and

lieutenants and captains. Do you have a particular denomination? Are you a captain or a general or—

MR. SCHAARS: Your Honor, I object.

MR. DRURY: I am merely trying to find out the line of authority.

THE COURT: The administrator.

MR. DRURY: I see.

BY MR. DRURY:

Q Now, accordingly you are the supervisor of these men who are on Northeast 1, is that correct?

A I'm not their direct supervisor, I am responsible.

Q It is your responsibility?

A My responsibility.

Q For the day to day operations of the security?

[318] A Of the jail, right.

Q And, these men refused to go on duty because of this unsightly mess that was on Northeast 1, is that correct?

A They didn't refuse to go on duty, sir, they refused to relieve the midnight shift on that particular post.

Q The entry says: "Refused to take unit until ordered by Lieutenant Feidler." Now, that is an entry by an employee, is that correct?

A I'm not denying that.

Q That watch detail refused to enter the unit. Now, were the conditions, from your investigation, so bad that they refused to go in there?

A You're getting the detail—that is the working detail assigned that unit, and you're getting the officer detail mixed up. There are two different segments there.

Q This is the cleanup crew, is that correct?

A This is the cleanup crew.

Q And it is their job to clean up this refuge, is it not?

A That is correct.

Q And they are getting paid for it?

A They are getting paid.

Q And if it was bad for them, did you ever make any type of an investigation to determine the complaints of the inmates who are locked in their cells?

A It wasn't the complaint, sir. It was that the detail [319] men were afraid to go into the unit, because of the inmates in Northeast 3 had threatened them repeatedly. They didn't want them to clean it up. They were threatened to come in and clean up or even feed. They were going to kill them.

Q But the inmates are locked in the cells?

A Inmates aren't always locked in the cells, sir. Everybody goes on the street. Everybody goes to Lorton. Everybody goes to the Federal penitentiary.

Q Northeast 1 is called dead lock?

A That is correct.

Q That means that the inmates are locked up in there unless they are specifically allowed out for showers or for eating or for bathing, is that correct?

A That is correct.

Q During this time period, these inmates were locked up, weren't they?

A That is correct, sir.

Q Now, there is a statement here that Officer Bimbo called and said that he would get some men to clean up the unit. I take it from the import of this entry at 7:50 on August 16, the reason the detail refused to go in there was because it was so dirty.

A That isn't the reason. The reason, sir, was that that particular detail was afraid.

Q Now, 24 hours later on the 17th of August, there is [320] a very cryptic statement: "The unit is still F-d up."

We will excise the little cussword that is there.

THE COURT: Now, Mr. Drury, do you have any more questions? Judge Hart had to go to a meeting of the judicial conference of the United States. His jury is out and they have asked a question. I promised to take the question and seek to answer the inquiry of that jury. If you have much more, I'll take a recess.

MR. DRURY: Yes, sir.

BY MR. DRURY:

Q 24 hours later then the cryptic statement that is made on August 17th, there is another statement on

August 18th, the unit is still "F-d up—count 76—one razor and no relief in sight." Now, that phrase, "relief in sight,"—

A Yes.

Q Are you telling this jury that for 48 straight hours you had a mutinous crew and there was no cleaning up of this Northeast 1 Sector?

A Yes. The unit was cleaned up. It does not say that the unit was never cleaned up. The unit was cleaned up. I think Officer Bimbo indicated he brought a crew in there and cleaned it up.

* * *

BY MR. SCHAARS:

[330] Q Now, on the 16th of August, of 1976, when the Northeast 1 was referred to as the unit that was fouled up, who fouled it up?

A The residents, themselves.

Q Did the correctional officers participate and assist [331] in fouling it up?

A No, sir. You have to feed the residents. What they do with their food, after you give it to them is some of them eat it, some of them throw it out, some of them throw it on the floor, some of them even throw it at the officers. We have documented evidence, documented cases where the officers have been assaulted.

Q Now, I would like you to clarify, if you could for a moment, the two types of crews that you have on the Northeast 1. You have a cleanup crew and a crew of correctional officers.

A That is correct.

Q Would you distinguish between the two and describe for the ladies and gentlemen of the jury the function in particular of the cleanup crew?

A Well, the inmate detail crew, which is the cleanup crew, when I say detail, it is not cleanup, they also come in and feed the residents. This is, they bring trays and take it down to them and feed them and when they are finished eating, they pick up the plates and take the food out and they do all of the cleaning.

Q Are these individual employees of the Department of Corrections or trustees?

A They are detailed inmates who have been classified as a less security risk than some of the other inmates and they are paid a small fee, not a large amount of money, but they [332] are paid for their labors.

Q Was it these inmates who refused to go into the Northeast 1 on this particular occasion?

A That is true, sir.

Q That is, on the 16th and 17th and 18th of August, 1976?

A During that period, yes, sir.

Q Now, you indicated at least in partial response to one of counsel's questions, that one of Mr. Drury's questions, that this detail was threatened with death and bodily harm?

A These are fellow inmates.

Q And these are inmates who would associate with people from maximum security if they got off maximum security and went back into the general population?

A That is correct.

Q These are inmates who may also associate with people who had been on maximum security whether they wound up at Lorton or another correctional institution?

A That is correct.

Q So, is it fair to say in parlance and dealings within that institution, the inmates who refused to go in were acting pretty wise at that point, because they probably could have gotten harmed?

THE DEFENDANT WALKER: Objection.

MR. DRURY: Objection. It is leading.

[333] THE COURT: It is cross-examination, of course, but this man is essentially a Government witness, so I would ask you to refrain from cross-examination from questions that normally you would ask on cross-examination to an adverse witness. I think you can do that without any difficulty.

BY MR. SCHAARS:

Q Can you draw any conclusions, sir, based on your experience, number of years as a correctional officer and tour within the Department of Correction, as to the wisdom or lack of wisdom as to these inmates going to Northeast 1 on these three days?

MR. DRURY: I object to that.

THE COURT: No, I think that is a proper question. Overruled.

THE WITNESS: Based on my past experience, it was a very prudent decision on the part of the residents to refuse to go in. I only found one man who was totally unafraid to go into Northeast 1, and I imposed on the Major to detail him to Northeast 1. They couldn't frighten him, so they tried to get rid of him by complaining to me that he was mistreating them, but I kept him in there.

Q This was another inmate?

A This was another inmate.

Q Despite the threats who would go in there?

A Despite the threats.

[334] Q Now, Mr. Drury questioned you with regard to the gentlemen in Northeast 1 as being locked up, what can they do if they are locked up, in your experience can they do anything?

A Well, you have to let a man out, you have to let him out to shower. You have to let him out to go to his visits. You have to let him out to go to medical, even if he is locked up, you have to feed him. You have to give him a trade. You have to give him a broom so they can sweep his cell out and a broom handle broken in half, in two, makes an excellent spear and people get hurt.

[348] THE DEFENDANT WALKER: The defense would like to call Officer Trent, please.

Whereupon,

BARRY ORLANDO TRENT

[349] was called as a witness by and on behalf of the Defendant Walker and after having been duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY THE DEFENDANT WALKER:

Q Would you state for the Court your full name, please?

A My name is Barry Orlando Trent.

Q Where are you presently employed, Mr. Trent?

A I am employed with the D.C. Department of Corrections.

Q Is that at the new D.C. Detention Facility?

A Yes, it is.

Q Were you employed there between July 1st and August 26, 1976?

A Yes, I was.

Q Uh-huh. And during that time what was your official capacity or function at the detention facility?

A Correction officer.

* * * *

[353] BY THE DEFENDANT WALKER:

Q Now, Mr. Trent, during the period that you worked in Northeast 1 housing unit as a correctional officer, were there any fires or burnings to your knowledge?

MR. SCHAARS: I would object. Any is a pretty broad term. Perhaps Mr. Walker can be more specific in terms of time frame.

THE COURT: You may ask the question during the month we are concerned with, July and August of '76.

BY THE DEFENDANT WALKER:

Q During the period of August 1st and 26, were there any fires in the Northeast 1 housing unit to your knowledge?

A Yes.

Q Mr. Trent, I know you probably can't remember exact days of fires that took place in that particular housing unit, but is it possible for you to demonstrate to the Court the frequency of the fires that took place in that unit?

A It varied. Sometimes you might have one or two and sometimes you might have none.

Q Would you say that there was at least a fire every week?

A Yes, sir.

[354] Q Would you say that there were possibly at least two every week?

A Yes.

Q Uh-huh. From your recollection, Mr. Trent, how long did the fires usually last?

A About five or seven minutes.

Q From your recollection, Mr. Trent, when these fires took place was it difficult to breathe in the block?

A No.

Q To your recollection, is there any fire equipment in Northeast 1 housing unit?

A Yes.

Q And where is that fire equipment located?

A It is located in the booth where the officer sits.

Q Whose function is it to extinguish fires?

A We have three officers in the block. One officer is in the booth, two on the floor.

Q Between August the 1st and August 26th, during the time you worked at the Northeast 1 housing unit, Mr. Trent, were there any incidents of beatings by inmates or correctional officers beating inmates?

A No.

* * *

[356] CROSS-EXAMINATION

BY MR. DRURY:

Q Officer, my name is John Drury and I represent Clifton Bailey, Clifford Bailey in this case. You stated that the fires sometimes ran to two fires a week, is that correct?

A Yes.

Q And at most they were five to seven minutes in duration, is that correct?

A Yes.

Q And these fires started sometime in June and ran into August, is that right?

A No.

Q When did they start?

A July and August.

Q July and August. So, that is approximately an eight to ten week period, is it not?

A Yes.

MR. SCHAARS: It is obvious what length of period it is.

THE COURT: Yes, Mr. Drury, don't trespass any more than you really have to.

BY MR. DRURY:

[357] Q Do you remember if any fire included or extended beyond a period of five to seven minutes?

A No.

Q What were the items used in starting these fires?

A Sheets, mattresses, towels.

Q And how would the fire be extinguished?

A With a fire extinguisher.

Q Who would do it, a correctional officer?

A Every time I was in the unit I did it.

Q I see. And, isn't it a fact from your knowledge you know that more than one prisoner was taken out and treated, medically, for smoke inhalation?

A No.

Q You never knew any officer or—strike that.

You never knew of any prisoner who was ever treated for smoke inhalation?

MR. SCHAARS: He has answered the question. Mr. Drury is asking each question twice.

THE COURT: Well, not each question. Once is enough, Mr. Drury.

BY MR. DRURY:

Q Have you ever assisted a prisoner to the sick bay or to the medical area?

A No.

Q Now, directing your attention to the period of June, [358] July and August of 1976, from your personal knowledge or own observations or from your readings in the log book, do you know whether any prisoner—or from any other source, do you know whether any prisoners were ever taken to a medical facility?

A For what reason?

Q For any reason. For a cut, for a bruise or smoke inhalation.

A Yes, sir.

Q And, do you remember if that was on Northeast 1, sir? Do you remember the cause for which they were taken—

MR. SCHAARS: Your Honor, I object at this point. Mr. Drury represents Mr. Bailey.

THE COURT: Yes. That is right. I am limiting your interrogation to Mr. Bailey. You have asked for records from the infirmary. I suppose that would be the best evidence.

MR. DRURY: Yes, sir.

BY MR. DRURY:

Q Do you know my client, Clifford Bailey?

A Yes, sir.

Q And, do you know him as a resident of Northeast 1?

A Yes, sir.

Q And have you ever been present or from your personal knowledge, do you know whether he has ever incurred any beatings by the correctional officers there?

A No.

[359] Q Do you know from your own personal knowledge whether he has ever been the subject of any smoke inhalation?

A No.

Q I see. I have no further questions.

THE COURT: Mr. Robbins.

CROSS-EXAMINATION

BY MR. ROBBINS:

Q Officer Trent, when a fire starts it takes about five or seven minutes for it to be extinguished, is that your testimony?

A Yes.

Q And does that refer to the flames only?

A No.

Q The smoke is all gone in the unit in five or seven minutes?

A Sometimes.

Q Other times it lasts longer, right?

A True.

Q How long is that?

A Probably fifteen minutes.

Q How does the smoke get out of the unit?

A Through the windows.

Q Aren't the windows shut?

A At that particular time the windows had been pried open by the residents calling out on the streets to the visitors [360] going past so the ventilation was pretty free, but the ventilation in the inside system was open.

Q Is there any other type of ventilation inside? Are there any fans in the unit?

A Once in awhile, sometimes we put fans up to get the smoke out of the unit.

Q Where would you put those fans?

A On the side that had the most smoke.

Q And, could you approximate the size of the units, of Northeast 1 unit?

A Forty cells on each side.

Q And the smoke at times would fill up the entire unit?

A No.

Q You could control the smoke before it got through the rest of the unit?

A No, sometimes it would all be on one side.

Q What would permit it from getting to the other side?

A Sometimes smoke is not that heavy on the other side and wouldn't reach the other side.

Q Sometimes it would, and it would take a significant period of time before all of that smoke was gone?

A Yes, sir.

MR. ROBBINS: I have nothing further.

* * *

[362] BY MR. SCHAARS:

Q Officer Trent, when these fires were started and you went to put them out, did you ever wait a significant period of time before you went in there to put them out?

A No.

Q If you saw a fire start in Northeast 1, what would be the first thing that you would do?

A The first thing I'd do is tell the officer in the booth, call up the man, tell them we have a fire in the unit

and then I get the fire extinguisher and try to put the fire out.

Q Is the booth also the bubble?

[363] A Yes.

Q What would you estimate, if you can, sir, your reaction time would be from the time that you discover a fire to the time you got there and tried to put it out?

A Two, three minutes.

Q In your experience in that cellblock during July and August of 1976, did you and the other officer who was out in the cellblock itself, ever decide to retire to the bubble or the booth to wait out a fire?

A No.

Q Have you ever known that to happen in that cellblock?

A No.

MR. SCHAARS: No further questions, Your Honor.

* * * *

[365] OLIVER BOLING

was called as a witness by and on behalf of the Defendant Bailey and, after having been duly sworn was examined and testified as follows:

DIRECT EXAMINATION

[366] BY MR. DRURY:

Q Sir, my name is John Drury. I represent Clifton, Clifford Bailey in this case. What is your name, please?

A Oliver Boling.

Q Where are you residing at the present time?

A At the new jail facility, 1901 D Street, Southeast.

Q What section of the jail?

A Maximum security, supposedly Northeast 1.

Q What cell are you in?

A Cell 62.

Q Did there come a time in the month of July, July and August that you had an occasion to be placed at the D.C. Jail, the new D.C. Jail facility?

A Yes.

Q What section were you placed in in the new D.C. Jail facility?

A Section Northeast 1.

Q How long have you been in Northeast 1?

A I have been in Northeast 1 for nine months.

Q Is that called the 'dead lock' section?

A Yes, it is.

Q Do you know my client, Clifford Bailey?

A Yes, I recognize the defendant.

Q How do you know him? How do you recognize him?

A I recognize him, first of all he's about five or six [367] cells from me and, you know, I used to trade books, you know, I used to do a lot of reading, so I just traded books with him.

Q Have you ever, personally, had an extended conversation with him?

A Only on one occasion.

Q When?

A When? Right before the incident, or incident was supposed to have occurred, Officer or Lieutenant—

Q You had a conversation?

A Right.

Q Let me go into that later. When did you have an opportunity to trade books with my client, Clifford Bailey?

A That is once in a blue moon.

Q Okay. Directing your attention, specifically, to the month of July and August, do I take it that you were not in dead lock prior to July at the new D.C. Jail facility?

A Right.

Q Have you ever witnessed or been a victim of any beatings in Northeast 1?

MR. SCHAARS: Objection, Your Honor. The question is not whether Mr. Boling has been the victim of anything, it is whether Mr. Bailey has been, and also the question is a leading question.

THE COURT: Suppose you go into your client's [368] experiences first.

BY MR. DRURY:

Q Did there come a time in August that you learned that Clifford Bailey had left the jail?

A Yes.

Q Preceding that date or that time, had you ever, personally, observed or from your senses determined that my client was being beaten by any jail guards?

A I can recall that he had.

Q Can you tell the ladies and gentlemen of the jury in narrative form how you can tell and what happened and what you saw or heard?

A Well, first of all my cell is, like five cells like I said once before, down from him. One particular evening I heard this racket at the door, because I'm right at the door, and it is about six or seven guards came into the cellblock, you know, they came in, they came right down to Bailey's cell. One pulled out a blackjack, the other one reached in his pocket and pulled out a can of mace and they proceeded into the cell, then I heard a couple of moans, a couple of groans you know. Then they came out of the cell and shut the cell back and then that was it.

Q Did there ever come a point in time that you personally were aware from your own senses of the threat directed against my client?

[369] A Yes.

Q Did you ever communicate that threat to my client?

A Yes.

Q Tell us how you became aware of that threat in your own words and as descriptively as possible.

A Okay. First of all, Captain Dickinson, Officer Webb and Sergeant Curran, came to my cell one morning and they say, "Boling . . ."—can I say what the words are?

Q Please.

A "We're going to bust your god damn ass." You know, I said, "For what?" You know, they said, "God dammit, you think you're rough." I say, well, you know, like I'm speaking out for my rights. And he said, "God dammit we're going to get your buddy, that nigger Bailey." 'We're going to kill him.' And, Officer Webb went into his pocket and pulled out a little knife, looked like a Boy Scout knife and said, "We're going to do it nice and quiet."

Q What did you do after hearing about this?

A Well, after I learned about it, the first thing I did was to inform the brother, you know, so he would be—

Q The "brother" meaning—

A Bailey.

Q How did you communicate it to him?

A The only time I was able to communicate that was when I got a visit, you know, that I was allowed to come out [370] during that period of time.

Q Tell us exactly what you did and how many days after you heard the threat and how, during being transported to a visit you talked to my client.

A I'm not clear on what you said.

Q You said that during a visit—

A Right.

Q —you left your cell—

A Right.

Q —and, did you have an opportunity to talk to Clifford Bailey?

A Right. Right.

Q Where?

A In his cell.

Q For how long?

A Approximately, about four minutes.

Q And who was being visited on that day?

A Who was being visited? I had a visitor.

Q I see.

A Right.

Q Were you taken out of your cell by the authorities?

A Right.

Q What occasioned the opportunity for you to talk or stop and talk to my client?

MR. SCHAARS: Your Honor, I object. We already had [371] testimony from this witness that he spoke to Mr. Bailey. I frankly don't see what the point is, how he happened to speak to him is relevant at all.

THE COURT: You may ask the question.

THE WITNESS: Well, when I came out of the cell, the particular officer that was carrying me to my visit, he forgot the handcuffs so he went up to the booth and during that time I was out without any handcuffs and I walked down to Bailey's cell.

BY MR. DRURY:

Q Now, were you aware of any fires that occurred on the hall or in the jail in Northeast 1?

A Yeah, I'm very, very much aware.

Q Can you tell us the nature of those fires or how they were started, how long they existed and who put them out?

A Yes. There is one particular officer in mind. Officer Webb, sometimes he comes in there and gets a paper bag and the cell that we are in doesn't have any windows, so he goes exactly right to, near Bailey's cell and pushes the bag in there and sets it on fire, you know, and then he adds a little bit more to it, him and his other officer that would be on with him.

Q Who else starts fires?

A Sometimes the inmates start them, too.

Q How long are they allowed to burn?

[372] A They are allowed to burn—an hour is the longest, maybe, sometimes longer.

Q Was this occurring, in your time frame, was this occurring when you were in dead lock between the time you came, in July, and the time that the escape occurred, in August?

A Right.

MR. DRURY: No further questions.

CROSS-EXAMINATION

BY MR. ROBBINS:

Q Mr. Boling, my name is Bob Robbins. I represent Mr. Cooley. Do you know Mr. Cooley?

A I know him by being an inmate, yes, I do.

Q Where, specifically in the institution did you know him?

A In the section, Northeast 1.

Q During what period of time was that that you knew him?

A In July.

Q Of what year?

A '76.

Q Did it extend any longer than that period of time that you knew him?

A Well, you know, I knew him, you know, by my being in the institution on the same side. See, they have certain cells with no windows. He was in one of them.

[373] Q Was he there in August of '76?

A To my recollection he was.

Q Were you aware that Mr. Cooley left the jail on August the 26th?

A Was I aware?

Q Yes.

A Yeah. Yeah. I was aware, you know, after I heard about it, you know.

Q And in the days and weeks prior to that time, did you ever see Mr. Cooley injured in any way?

A Well, rumors, occasions, you know, I had seen the officers—

MR. SCHAARS: Objection, Your Honor. If it is rumors.

THE COURT: Just answer the question.

BY MR. ROBBINS:

Q Did you see—

A Right.

THE COURT: Did you see?

THE WITNESS: Right.

BY MR. ROBBINS:

Q Did you see any injuries that Mr. Cooley had in the weeks and days before August the 26th?

A His lip was busted.

Q And, do you know how his lip became busted?

A I seen the officer take a blackjack and hit him in [374] the face.

Q Where did that occur?

A I seen that occur in the hall.

Q What hall are you referring to?

A The hall leading to Northeast 1.

Q Could you describe the slap, how it occurred, if you know?

A I was coming off of a visit and, you know, it was about two or three officers, you know, I was wondering

who they had, you know, in the corner. I saw the officer came back with the slapjack and when he come up I saw Cooley over there. He had got hit in the mouth.

Q With a slapjack?

A Right.

Q What do you mean by a slapjack?

A A slapjack is a leather ornament that police normally carry with a piece of steel on the inside of it, you know, this is what they use, you know.

Q Were there any other occasions when you saw Mr. Cooley injured?

A I seen him roughed up quite a few times in front of my cell.

Q This is right in front of your cell?

A In front of my cell.

Q How could you see out of your cell?

[375] A Well, we have bars and his was about three doors from me, I couldn't help but see it.

Q Can you estimate how many feet it was away from you?

A I'd say about 13 feet.

Q Can you describe the injury that Mr. Cooley incurred because of this attack?

A Well, you know, later that night he had complained about his side.

Q Were you ever a witness to any threats made to Mr. Cooley?

A Well, you know, like my booth, my cell is sitting right next door to the booth. I have heard officers come inside the booth and ask about Cooley and on two occasions I can recall them saying that they were going to kick his ass good.

Q Did they give any reason why they were going to do that?

A No, you know, I got back from the cell. The officer was looking at me like he wants to come down and jump on me because I was standing there, so you know, I didn't hear anymore.

MR. ROBBINS: I have nothing further, Your Honor.

THE COURT: Mr. Walker?

CROSS-EXAMINATION

BY THE DEFENDANT WALKER:

[376] Q Mr. Boling, you presently reside at the D.C. detention facility, 1901 D Street, Southeast?

A Yes, I am.

Q In what part of the location—you are in Northeast 1?

A Yes.

Q The deadlock section?

A Right.

Q What is your cell location?

A My cell location is cell 62. It is right—as you are coming from the door, right in front on the booth.

Q What is my cell location?

A Your cell location was over on the other side.

Q What is my cell location now?

A Your cell location is about two doors from me.

Q When were you first committed to the detention facility?

A The early part of July.

Q So, you were housed there between July 11 and August 26th?

A Right.

Q You are familiar with me?

A Right.

Q You know my name?

A Right.

[377] THE DEFENDANT WALKER: Ralph Walker-El. Will the Court show that the defendant has identified Ralph Walker?

BY THE DEFENDANT WALKER:

Q You are aware that an escape allegedly took place at the D.C. detention facility sometime in August of 1976?

A Right.

Q Are you able to tell exactly what day that alleged escape took place?

A To my recollection, I can't recall the precise date, but I knew that it was in August.

Q Now, you spoke about the burnings that took place in the cell house?

A Right. Right.

Q To your recollection, how often did the burnings take place during this period between July 1st and August the 26th?

A It was every day.

Q Every day?

A Every day.

Q All right. You say the fires lasted approximately an hour?

A Hour.

Q As far as being able to breathe freely during the time the fires were burning when the smoke was in the block, were you able to breathe freely?

[378] A No, I wasn't

Q Did you do anything to help accommodate you as far as your freedom of breathing?

A I tell you how I did breathe. The toilet that we have is a big round commode. It was cold water coming up from it, and the block gets smoky and I have to get on my knees and stick my head in the toilet in order to breathe I have a cell with no window. There is no ventilating system there, so this is how I breathe after a period of time.

Q Is there any type of fire equipment in Northeast 1, to your knowledge?

A They got about two fire extinguishers, but they stay empty.

Q Do the officers ever put these fires out?

A No, the just let them burn until they burn out.

Q You say that sometimes the inmates started the fires and sometimes the officers.

A Right.

Q You have witnessed starting fires too?

A I have witnessed it.

Q All right. Have you ever requested medical attention for smoke inhalation?

MR. SCHAARS: Objection, Your Honor. It is not a matter whether this gentleman has requested attention, whether or not Mr. Walker has.

[379] THE COURT: Sustained.
THE DEFENDANT WALKER: All right.

BY THE DEFENDANT WALKER:

Q What if an individual gets sick during the evening or night, is it possible to get to the hospital from Northeast 1?

A It is very, very likely that he would get there.

THE DEFENDANT WALKER: I have no further questions from Mr. Boling.

THE COURT: Mr. Schaars.

CROSS-EXAMINATION

BY MR. SCHAARS:

Q Sir, I'd like to speak to you and ask you questions initially about your answers to questions from Mr. Drury, Mr. Bailey's counsel.

You indicated that there was a time that you saw six or seven guards come to the cellblock with a blackjack, and mace, and you heard moans and groans.

A Right.

Q And, you concluded that those means and groans were from whom?

A Bailey.

Q Did you see Mr. Bailey at that time?

A Did I see him? He was hanging halfway outside the door.

[380] Q Outside of which door, sir?

A Cell door.

Q He was clearly within your view, eyesight?

A I could see it.

Q Do you know when this occurred, sir?

A Do I know when it occurred? It occurred in August, the first part.

Q The first part of August. Would that be before the 15th? August has 31 days, would it be safe to say it was before the 15th?

A Yes.

Q Now, sir, you have indicated that there was also a time that Mr. Bailey was apparently told that he was going to be killed?

A I didn't say that.

- Q You were told he was going to be killed?
 A Right. Right. Right.
 Q Do you know when that was, sir?
 A It was the early part of—late part of July.
 Q Would that be from the 20th to the 31st?
 A From the 20th to the 31st? Right.
 Q Now, you also indicated that you had an opportunity to communicate that threat to Mr. Bailey?
 A Right.
 Q How soon after you heard that threat were you [381] able to communicate that threat to him?
 A As soon as I got out for a visit.
 Q Well, sir, what I'm asking is in terms of minutes, hours, or days, when was it?
 A It was about two days later.
 Q So, would that still put that in July, sir? Would that be fair to say that it was sometime in July that you warned him?
 A About the end.
 Q Now, sir, it is your testimony that although the inmates started some of the fires, some of the correctional officers started some as well, is that correct?
 A That is correct.
 Q And these fires burned for an hour, right?
 A Right.
 Q What is used to get these fires going by the correctional officers?
 A Well, you know, one particular officer, where he gets the trash bag, they have plastic containers with trash in it and he gets the trash bag and goes right down to Bailey's.
 Q That is Mr. Bailey?
 A Right. Right near his cell. I used to wonder why he used to go down there, but he'd go there and set it on fire.
 Q How long would a trash bag burn?
 A Well, it would probably burn about ten minutes.
 [382] Q Ten minutes. But, see, first of all let me stipulate they keep on putting trash on top of trash.
 Q So, he returned to feed the fire?
 A Right.

- Q Would he stand there and watch the fire burning?
 A No, he sits up in the booth.
 Q As soon as the fires die down, he returns?
 A Right. Until they run out of trash.
 Q Let's talk about Mr. Cooley, sir.
 You indicated that you noticed that Mr. Cooley had his lip busted?
 A Right.
 Q Do you know when that was, sir?
 A I can't recall the precise date.
 Q Well, sir, would it have been in July or August?
 A Coming into August.
 Q Well, would it be fair to say that it was within the first ten days of August?
 A Well, I'm not going to say. I'm not sure. I recall the incident.
 Q What I'm trying to ask you, if you can say, by coming into August, what do you mean?
 THE DEFENDANT WALKER: Objection, Your Honor. He said he couldn't answer the question. He didn't know.
 MR. SCHAARS: Very well, Your Honor. I will withdraw [383] the question.
 BY MR. SCHARRS:
 Q Now, you indicated that there came a time when two or three officers had Mr. Cooley in a corner.
 A Right.
 Q Do you know when that was?
 A This came in as a surprise to me. I can't give you verbatim the day.
 Q I'm sure it was a surprise to you, but what I'm asking is: Can you put it in terms of month, July or August?
 A I cannot say. I cannot say.
 Q Now, sir, you knew Mr. Bailey and you knew Mr. Walker and you knew Mr. Cooley, is that true, sir?
 A You know, know of them by the inmates in the block.
 Q Did you know that there was a time you no longer saw them on the block in August of 1976?
 A I remember that.

Q One day they were there, the next day they weren't?

A I'm not saying that.

Q Well, how would you characterize it, sir?

A I characterize it they were there month with me before they were gone.

Q But, there was a time when they weren't there anymore?

A Right. There was a time.

Q Do you know whether or not they were released by the [384] correctional authorities?

A I have no idea. I'm not nosey.

Q Yes, you managed to see just about everything that goes on in the cellblock, right?

A When it makes noise and racket.

Q You're able to distinguish moans and groans and who they belong to?

A Right. I can tell voices.

MR. SCHAARS: No further questions, Your Honor.

MR. DRURY: Nothing further, Your Honor.

MR. ROBBINS: Just a couple of questions, Your Honor.

RECROSS-EXAMINATION

BY MR. ROBBINS:

Q Mr. Boling, August 26, does stand in your mind as a date you remember, does it not?

A Right.

Q How long before that, how much earlier did the officers hit Mr. Cooley in the face with a slapjack?

A I want to be right. I don't know if it was June or—I don't want to say June or July when it might have happened in August. I have to go for July. I have to go with July.

Q What about the—when the officers had him in the corner and were beating him. How much time elapsed between [385] that and August 26th?

A How much time did elapse?

Q When did that occur in relation to August 26th?

A I can't recall. I can't recall. See, the first time when he got slapped was in July that I had told you. I said he got backed up against the cell door.

Q Uh-huh. And the other incident occurred after that?

A The other incident occurred before that.

Q Okay.

MR. ROBBINS: Thank you, Mr. Boling.

MR. DRURY: I have no questions, Your Honor.

* * * *

[386]

GARLAND HINES

was called as a witness by and on behalf of the defendant Cooley and after having been duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ROBBINS:

Q Mr. Hines, in a loud, clear voice so everybody in the courtroom can hear you, would you state your full name?

A Garland Hines.

Q Where do you currently live?

A Lorton Reformatory.

Q And in July and August of last year, 1976, where did you live?

A Up in the new jail, 1901 D Street, Southeast.

Q Did you live in a specific location at that place?

A Yes, I did.

Q Where was that?

A Northeast 1.

Q Did you know at Northeast 1 a man named, Ronald Cooley?

[387] A Yes, I did.

Q And could you point him out if he is in the courtroom?

A Right there.

Q Would you describe what he's wearing?

A He's wearing a blue sweatshirt, white shirt.

MR. ROBBINS: Indicating the defendant, Your Honor.

THE COURT: Yes.

BY MR. ROBBINS:

Q Now, during that time were you ever aware by your observations of any injuries that Mr. Cooley had?

A Yes, I do.

Q Would you describe those to the Court?

A Well, one incident was when I was standing in my cell, when two officers was escorted Mr. Cooley back from Court. We know Mr. Cooley was going down the hallway and one officer was pushing him. Mr. Cooley said, "You don't have to push me." He said, "I can walk." At the time he was handcuffed. Officer Smith said, "Look, just shut up, keep moving." You know, so Cooley said, "Man, I told you I could walk, man, you don't have to push me." So, he turned around—Cooley turned around trying to defend himself. He turned around and the officer pushed him. Officer Smith pulled out a big stick, a blackjack and hit him across the face. Another officer—I don't recall his name, I know him when I see him, he sprayed some tear gas in his face. Mr. Cooley came on the unit and his [388] face was bleeding and his hands were up like this over his face, you know.

Q Do you remember specifically when this occurred?

A I can't recall the date. I think it was in July or August.

Q And are you aware of any other similar incidents?

A Right. A few times the officers had opened up his cell, you know, come in and threatened him, I understand they jumped on him a few times trying to say he was setting fires and things.

Q Could you see what occurred?

A No, I couldn't really see, but if you was there you would know that something was happening in there, you could see the scuffling and everything.

Q Where was your cell in relation to Mr. Cooley's cell?

A About nine cells away from him on the second floor.

Q On the second floor?

A Right.

Q Now, the incident that you described earlier with the blackjack, could you actually see that happening?

A Right, because my window was broke, you know, my window was facing the hallway.

Q So you looked out your window into the hall?

A Right.

Q Are there any other incidents in regards to Mr. [389] Cooley that you saw?

A Right. I saw the officers come down one day when there was a big fire, about four or five mattresses being set afire, and Officer—I mean Captain Dickinson, and a few more goon squad officers came in with him. They came into Cooley's cell and another cell to a guy by the name of Sonny, and he said, "Look . . ."—he said, "I knew you two, the only two down here responsible for these fires." He said, "If another fire's set tonight or any other time, I'm going to have both of your cells, and I'm going to come down and kill you." And, Officer Webb said, "I'm coming in there, too, because I don't want you anyway."

Q Now, are you aware, Mr. Hines, of whether or not—strike that.

Does the 26th of August, 1976, stand in your mind for any reason?

A Yes.

Q What happened on August 26th with regard to Mr. Cooley?

A Well, that was the day that he escaped, right?

Q When did these incidents that you have just related to the Court, the attacks with the subject and the cell with the threats, when did they occur in relation to August 26?

A About two or three weeks.

Q Before that time?

[390] A Uh-huh.

Q Were you aware of any fires ever happening in Northeast 1?

A Oh, they had been quite frequently, almost every day.

Q And, about how long would a fire last after it started?

A Well, the fires—the flames themselves would be something like an hour and a half, but after the flames go away the smoke would still be there, the thick smoke.

Q How long would the smoke continue?

A All night. All night.

MR. ROBBINS: Nothing further, Your Honor.

CROSS-EXAMINATION

BY MR. DRURY:

Q Mr. Hines, my name is John Drury. I am the attorney for Mr. Clifford Bailey. I have never met you before, have I?

A No, you haven't.

Q Speak up, please.

A No, you haven't.

Q Thank you. Do you know Clifford Bailey?

A Not personally, but he was the inmate at the jail at the time that I was up there.

Q Is he known as Sonny?

A Right.

[391] Q Are you presently incarcerated in Northeast 1?

A Northeast 1, now.

Q Yes.

A No, I'm not.

Q Where are you now?

A I'm at Lorton Reformatory.

Q Directing your attention to June, July and August of 1976, were you in Northeast 1 or dead lock at that time?

A In July of—I was, I think I came over there July 1st. The first week of July or the second week of July.

Q How long did you stay?

A I stayed for a month. I stayed for a month the first time. I stayed for a month the first time.

Q And, did you know of an escape that occurred from the new D.C. Jail complex in the latter part of August 1976?

A Right after it happened.

Q And were you in dead lock at the time that it occurred?

A Yes, I was.

Q So that it was a matter of some significance in dead lock that three or four individuals had escaped, is that correct?

A Say that again.

Q It was a matter of some significance to you being a resident of dead lock that an escape occurred, is that right?

[392] A Right.

Q Did you find out that one of the people that escaped was Sonny Bailey or Clifford Bailey?

A Say that again.

Q Did you find out that one of the persons who escaped was Sonny Bailey or Clifford Bailey?

A Right.

Q Have you ever talked personally to Clifford Bailey prior to coming down and testifying in this case?

A No, I haven't.

Q Have you ever talked—strike that.

During the summer months, July and August of 1976, did you have any personal face to face conversation with my client, Clifford Bailey?

A Say that again.

Q Did you have any conversation, did you talk to him?

A Did I talk to him?

Q Yes.

A About the case?

Q No. About anything.

A No.

Q What cell were you in during that time period?

A I was in two cells. I was in cell 57 and 34.

Q Do you know what cell Clifford Bailey was in?

A I think he was in cell 67 or 68.

[393] Q And on what occasions would you have an opportunity to see Mr. Bailey?

A When he was coming out, going on his visits or when he was standing up in the cell.

Q Did you ever have any long conversations with him?

A No, I didn't.

Q Were you ever aware of any beatings that were administered to my client during July and August of 1976?

A A couple of times.

Q Now, when did they occur? Did they occur in July or in August as best you can recall?

A I think about the second week in August.

Q Now, who would administer these beatings to him?

A Well, I don't know the officer's name, but I probably know him if I see him again.

Q Okay. Would they beat him up in the cell or outside of the cell?

A Beat him up in the cell.

Q Do you know why they beat up Sonny Bailey?

A They thought he was—

MR. SCHAARS: Objection.

THE COURT: I will let it in.

THE WITNESS: —responsible for the fires and flooding that was happening in the unit.

BY MR. DRURY:

[394] Q I see. From your personal knowledge, did you know if Clifford Bailey ever filed a lawsuit in Superior Court against—

A No, I don't.

Q —any guards?

Did you ever become aware that a threat had been made by some guards against my client, Clifford Bailey?

A Yes, I have.

Q How did you happen to come to that information? How did you learn about it?

A Because I heard—overhead Captain Dickinson and Officer Webb say it.

Q Do you remember what they said?

A When I told him—he said, "The next time a fire is set in here. . ."—he was going to open Mr. Sonny's cell and Ronald Cooley's you understand, he was going to kill him because he knows he was responsible for doing it.

Q Do you remember as best as you can, what time period, when this occurred, this statement, sir?

A It was in the evening. I don't recall the time.

Q You don't remember the month or the day?

A It was in August. It was in August.

Q Do you remember the conditions of the cellblock during mid-August?

A Right.

[395] MR. SCHAARS: Objection.

THE COURT: Overruled.

BY MR. DRURY:

Q Was there a period of time in mid-August that the floors were covered with garbage and refuse?

A Right. This was about two weeks straight.

Q Do you remember whether anyone cleaned it up?

A No, I don't.

Q Do you remember—strike that.

I have no further questions.

THE COURT: Any questions, Mr. Walker?

THE DEFENDANT WALKER: I have no questions.

THE COURT: All right, Mr. Schaars?

CROSS-EXAMINATION

BY MR. SCHAARS:

Q Mr. Hines, you have indicated in response to a question from Mr. Robbins, as Mr. Cooley's attorney that two escort officers or convey officers, as you referred to them, hit Mr. Cooley?

A Right.

Q And you indicated that that occurred in July and August of last year, did you not? Is that true?

A Right. I think it was in August.

Q Do you know when in August, sir?

A No, I don't know the exact date.

[396] Q Well, you were asked on your direct examination if the date of August 26th stood out in your mind and I believe your response was that it did.

A Right.

Q Was it closer to August 26th that date that sticks out in your mind, closer to the beginning of August that occurred?

A Would you repeat that again?

Q The first incident with Mr. Cooley and the two officers, you have indicated that that occurred in August.

A Right.

Q And you have also indicated that August 26th sticks out in your mind.

A Right.

Q Now, did that incident occur closer to August 26th or closer to the first of August, if you remember?

A I think closer to the first.

Q Closer to the first?

A Right.

Q Now, sir, you also described a situation where officers opened Mr. Cooley's cell and jumped on him?

A Yes, sir.

Q What month did that occur in?

A In was in August, too.

Q Now, sir, in relationship to that escort officer [397] incident, did it occur before or after that?

A Before.

Q Before. Now, you also described a situation where Captain Dickinson in the company of another officer threatened Mr. Cooley?

A That is right.

Q Did that occur before or after the officers went into the cell and jumped on Mr. Cooley?

A Before.

Q Before. Did that happen before or after the officers went into Mr. Cooley's cell and jumped on him, that threat?

A Did it happen after?

Q Did it happen before or after the escort officers had an incident with Mr. Cooley?

A It was before.

Q So, it was between—is it safe to say it was between the escort officer incident and the gentlemen going into his cell, is that fair to say?

A Would you repeat that?

Q Well, sir, you have just said that Mr. Dickinson made that threat?

A I have trouble with one of my ears.

Q I'm not trying to confuse you, sir, I'm—

A I just want you to know that I have trouble hearing.

Q Let's back up a little bit.

[398] You just testified that the two escort officers, that incident occurred closer to August 1st than to August 26th, is that correct?

A Right.

Q And you also indicated that the officers who went into Mr. Cooley's cell went into his cell before the escort officer incident?

A No, afterward.

Q All right, sir.

Now, when did this last incident occur, the threat incident?

A I can't remember. That was after the hallway incident.

Q That was after the hallway incident?

A Right.

Q Now, sir, with regard to Mr. Bailey, that is Mr. Drury's client, you indicated that the threat to Mr. Bailey occurred in August, is that correct.

A Right.

Q And you have also indicated that August 26th stands out in your mind, that is true?

A Yes.

Q Did that threat occur closer to August 26th or closer to August 1st?

A Right around the first.

[399] Q Closer to the first than the 26th.

No further questions, Your Honor.

* * *

RONALD CLIFTON COOLEY

was called as a witness by and on his own behalf and after having been duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ROBBINS:

Q Mr. Cooley, speaking clearly in a loud voice, would you please state your full name?

A Ronald Clifton Cooley.

Q How old are you, Mr. Cooley?

A 23.

Q Now, Mr. Cooley, directing your attention to July and August of 1976. Where did you live?

A 1901 D Street, Northeast.

Q What is that address commonly known as?

A The new D.C. Jail.

[400] Q Where in the new D.C. Jail did you live?

A Northeast 1.

Q Did you live in any particular cell.

A Cell 63.

Q For the entire time?

A For approximately ten months. I'd say approximately ten months.

Q Would you describe that cell?

A The cell itself. It has got a—I was in a cell with no window. It has bar doors. It is about three feet away from, they call it a bubble. I call it a booth. Officer's booth.

Q How far away?

A Three or four feet.

Q How large was the cell?

A I ain't going to make no estimations. I don't know the width or the length of it.

Q Well, would you say that it was as long from me to you?

A Well, my cell?

Q Yes.

A I'd say it—the cell is about you know, we could say average. It ain't big. I ain't going to make no estimation. I don't know. It could have been 9 by 12. I ain't going to say. I ain't going into that.

[401] Q On an average day, Mr. Cooley, how often would you be allowed out of your cell?

A Me? I was never allowed out of my cell.

Q You never left your cell?

A No.

Q Didn't you go for showers?

A When they feel like giving them to me.

Q Well, about how often would that be?

A Well, they had me on special handling, right. So, when they get an officer—like they says, three officers in there, there would be two in the block at all times and by me being on special handling if they have three officers in the block I might get a shower. But, like Officer Vincent, if he's there, he likes a man—like he will let you out, and says I'm going to stand on the rail and watch while you get a shower, and they ain't going to send anybody up because it is me.

Q How would you get from your cell to the shower?

A My cell is the third cell from the shower.

Q How would you get from your cell to that shower?

A Officer Vincent had an officer in the booth. He come out of the booth. He had an officer in the booth open the cell while he stands there, gets me safe and when I come out to get a shower he walks me to the shower and stands on the steps to make sure I don't come out or go running.

Q How were you dressed as you went to the shower?

[402] A I had—my towel and shower shoes on.

Q Did you ever have handcuffs on?

A I have handcuffs on. If Officer Vincent ain't there—Officer Vincent don't want to go through it. Say, you have to wait until after the count, until after visitors. There's so many, you know, have to schedule other people. He don't want to go through it, so he takes it on liberty. Most of the officers that come in there, they have handcuffs on and still want two or three more officers.

Q Now, Mr. Cooley, you were in Northeast 1 for approximately ten months—

A Yes.

Q —you testified?

Did there come a time when you left Northeast 1?

A Yeah. I left Northeast 1 quite a few times.

Q Did there come a time when you left the jail?

A Yeah. There came a time when I opened the cell and I was—they told me, you know, all depends how you talk about how I left.

Q Right.

A Like I was forced to leave the jail.

Q When did this occur?

A August 26th.

Q Now, in the weeks before that time, did you ever have any confrontation with the guards at—

[403] A Yes.

Q —D.C. Jail?

A Confrontations with the guards. Confrontation with other people, like getting back, you know.

Q Just answer my question, Mr. Cooley.

A Yeah. Yeah.

Q Did you ever have any confrontations with the guards?

A Quite a few of them.

Q Would you describe them and tell when they occurred?

A Right. See, I guess I—like I—okay. I went to court one time. I was over at Superior Court. I came back from court, after court came back about 2:00 o'clock.

Q When was this? Do you recall? Do you remember the date?

A This was about—as a matter of fact it was August 9th, approximately, I went down for the indictment.

Q Continue, please.

A And came back about 2:00, 2:30 o'clock and kept me downstairs until 10:30. When I get ready to ask them was I ready to go up, he said, "Yes," take off my clothes. When I get my clothes off Officer Brown tells me that you take no shit in your cell, and you get out of the cell now. You ready to do what you're going to do? I said, "Look, man, I'm tired." "I don't want to hear this shit." Like I ain't going to do no fighting. I ain't going to let anybody hurt you. So he said, [404] "You're going to fight."

I'm tired, but I ain't going to let him hurt me, so I back up against the bar. I look around. I see no other inmates. Over here, he says; it's going to be me and you. So I said, "Well, yeah, all right."

So, when I turned around six other officers like, Smith, Graves and two other white officers, they tell me—see they got the big plastic flashlight see, because people complain so much about the beating and bruises. They cause too much problems. So they use plastic flashlights so you won't be bruised so much, you know.

So, I fall out to the floor, you know. I get back up. I know I'm going to get whopped, so I just go ahead and let him beat me. So they bring me down, shackling me down the hall. I'm standing there talking, see if my lawyer can't do anything about this and they say, "Man, get down the hall." I got so damned mad I turned around and do like this. So he push me down. So, I go in the cell. The next shift comes on. They come down to my cell. I ask, "Can I go to the hospital?" They say, "Yes, we're going to check on it," but at the same time I asked Captain Dickinson said he's coming up to the cell to see me, but he ain't never come.

Q Were you able to call your lawyer about this?

A We didn't get phone calls.

Q Did you make any complaints to anybody about this?

[405] A I made complaints to Judge Eugene Hamilton over at Superior Court.

Q Did you make any complaints to any prison officials?

A All of them all of the time. Yeah, I—like they don't believe nothing I say.

Q What if anything did you notice that they did about your complaints?

A I—just like I told you. They act like they don't believe nothing I say. They don't believe nothing else. You ain't going to put it on paper.

Q After August the 9th, did anything similar to this occur?

A Well, like I been beat quite a few times. It is hard to go into it. Like man, I've been locked up almost

a year and a half. It is hard to go into. Everytime I think about it I get mad. I don't like talking about it, you know. But it happens quite a few times. You know, like man, I know I'm on trial for escape and all that, man, but I was forced to leave, you know.

Like they say they're going to kill me if I didn't go and I ain't trying to die.

Q When were these statements made?

A These statements made August 26th.

Q What were your feelings after hearing those statements?

A They said—like I was out of my cell. They say you [406] be gone or we're going to kill you. I say, "Man, I ain't escaping." They say, "Man, you're out of your cell." "We don't trust you." "You're going out, just like that."

Q Who said this?

A They said it.

Q Who is "they"?

A They did, The people I'm on trial with.

THE DEFENDANT WALKER: Your Honor, I object to that. That is a violation of my Fifth Amendment Rights against self-incrimination. He, being a codefendant of mine. As a matter of fact, Your Honor, the defendant at this times moves for a mistrial.

THE COURT: Denied.

THE DEFENDANT WALKER: All right.

BY MR. ROBBINS:

Q Who opened up your cell?

A The police opened up my cell.

Q What do you mean by "the police"?

A They the only ones that can open the cell.

Q Who do you mean by "the police"?

A Officers.

Q Who are you referring to? Correctional Officers?

A Yes.

Q What again made you leave your cell?

A They let me out.

[407] Q Had you ever made any attempt prior to this time to leave the jail?

A I ain't never escaped nowhere.

Q And, why not?

A Why not? Because I ain't never wanted to. I was going to like file a suit on them.

Q What made you take this opportunity to leave the jail?

A Like I just told you.

Q Would you state it again?

A They made me leave.

THE DEFENDANT WALKER: Your Honor, we object to that.

BY MR. ROBBINS:

Q Once you left the jail, Mr. Cooley, did you make any attempt to notify anybody in authority to say you were out and did you make any attempt to notify anybody that you were out?

A Yeah.

Q To whom?

A Like I ain't do it per se. But, like when I went home, you know, my people called and I told them that I had, I told them what happened. Why I had done it. They was mad. I told them why I had done it. They understood, but they called and never got in touch with anybody.

Q Did you ever make any attempt to call anybody, yourself?

[408] A I don't know nobody to call. I'm thinking like this here: They don't like me in the jail. Ain't nobody I can call.

Q Why did you not call anybody at the jail?

A For what?

Q Did you feel that there would be any purpose in doing that?

A It wouldn't have been none. They probably came and got me, and then make me try to run and they shoot me in half when they come and get me.

Q So you feared for your life. You could not call for that reason?

A That is right.

Q Did you ever leave Washington, D.C., after you left the jail?

A No.

MR. SCHAARS: Objection, Your Honor. It is not relevant to anything. It doesn't matter if he went to Florida.

THE COURT: Overruled.

BY MR. ROBBINS:

Q Did you ever leave Washington, D.C.?

A No.

MR. ROBBINS: I have no further questions.

THE COURT: Mr. Drury?

[409] CROSS-EXAMINATION

BY THE DEFENDANT WALKER:

Q Your name is Ronald Cooley?

A Yeah.

Q You were housed at the D.C. detention facility, 1901 D Street, Southeast between July 11 and August 26th?

A Yes.

Q Do you know the codefendant, Ralph Walker-El who is now questioning you?

A By being in the same block.

Q Mr. Cooley, you indicated to your attorney that you were forced to leave, that you were in fear of your life, is that right?

A Right.

THE DEFENDANT WALKER: No further questions, Your Honor.

THE COURT: Mr. Drury.

CROSS-EXAMINATION

BY MR. DRURY:

Q Mr. Cooley, I don't have to identify myself. You know who I am, don't you?

A Right.

Q Mr. Cooley, when did you get on dead lock?

A I ain't never got out.

Q When did you start?

[410] A When I started get in on dead lock?

Q Yes.

A Well, I got on dead lock—

Q The year of 1976, let's limit it to that.

A April 22nd.

Q Did there come a point in time in the summer, sometime in June that you learned that there was an inmate on the Northeast 1 sector by the name of Clifford Bailey?

A Yes, sir.

Q Was he known as Sonny?

A I hear people call him Sonny.

Q What do you call him?

A Who? Me? I call him Bailey.

Q What cellblock were you in?

A Northeast 1.

Q Do you remember what cell you were in?

A 63.

Q What cell was he in?

A I don't know his cell. It was on the same floor. I'd say—I think between cell 68 or 67.

Q Did you know him prior to the escape?

A Nope.

Q Did you escape from the jail at the same time, within five or ten minutes of him?

A Yep.

[411] Q Now, were you aware of any types of threats that were issued against Mr. Bailey?

A I was aware of them, but I ain't, you know, I was aware of them, yes.

Q How did you become aware of them?

A Like the officers in the jail, the officers being on Northeast 1, they feel as though everybody in one block are friends and have some type of semblance from the same type of background or neighborhood. They say we all know each other. This is how they then go forth to tell me—like, really, I'm going to put it to you like this: Me and the officers are fighting, so they tell me, they say, "Yeah, you tell your buddy, Mr. Bailey that—since he likes going to court and testifying for everybody,

this, that and the other, and he likes Mr. Brad King so much, you tell him we going to kill him and see if Brad King can't pay for that."

Q Who is Brad King?

A I don't know him.

Q In what context was the name Brad King used?

A Like—it seemed like to me like they despised both of them. Like they done something to one of the officers or the people. I don't know for what reason.

Q Was Brad King a defendant in a case?

A In this case?

Q In another case.

[412] A I don't know.

Q Now, did there come a point in time that you learned my client had filed a suit against a number of the jail guards?

A It was quite a few suits and petitions.

Q I'm merely asking you whether you were aware, during the summer of 1976 my client filed a suit against the D.C. Jail guards?

A Yeah, I was aware.

Q How did you become aware of it?

A Police told me.

Q By the "police" you mean the Metropolitan Police or the jail guards?

A The jail guards.

Q Which ones?

A Graves told me. Smith told me, and then Brown told me.

Q Do you know what the underlying incident that caused this suit was?

A Like I said, I seemed to get a beat a few times. I seen him get beat, a few times. He be talking to a couple of dudes, you know, tell him hi, I ain't going to argue with them. I will file on them. So, I guess that is what caused it. I ain't going to make no statement because I don't know.

Q Did there come a time—strike that.

You have heard testimony from Lester Robinson here, [413] today, as he read through the log book that there were fires during July and that there were also incidents during August. Is that correct?

A Right.

Q And, could you describe in your own words what was occurring in mid-August that caused these entries in this book on August 16, 17 and 18?

A Well, started off on the 16th. I remember that real good.

Now, it was hot, you know, everybody else is going off to rec. They tell us we can't go to rec. They go outside. We're locked up. We don't go outside or nothing.

So, you know, we don't get a chance to be out. We come out, one at a time like I'm on special handling so I got to be handcuffed, everything when I come out. See, I don't get no rec, see. I have been in the jail ever since it first opened. Everbody gets rec. The paper states that everybody is supposed to get rec. So, the dudes, you know, the inmates has got—

Q Just slow down. Everyone is supposed to get recreation, is that right?

A Right. Right.

Q And the people on special handling, do they get special rec?

A I said everyone is supposed to get recreation.

[414] Q So, we're talking about August. We're talking about the fact that people are not allowed out to get recreation. Please continue with your statement.

A Okay. So like the dudes in the block, you know, they get to squawking. We want to see the Captain. They want rec. We want to be out of the cell. We want this. We want that. You know. You got three officers. I I don't know what they be present, or what you call it, they call, "your dead lock." 'Lay down.' "You don't get no rec." 'If you keep on you're going to get some rec.'

See, I know what they're talking about so I don't want to be saying nothing. I tell you like this here: They be burning—the inmates—they had a legitimate reason to burn. You burn when you stay there 24 hours a day. You get a shower if the officer feels you get to get a shower. If they say you don't get none, you don't get one. You can report to anybody you want.

Q When was the last time you had a shower?

A Right now I get showers. I'm in Lorton Reformatory. When I was up at the jail they took my visitors. They wouldn't let my wife, my mother, my

lawyer come over there. See, I got to talk to my lawyer and I got to be handcuffed and sit with the officer standing behind me. When I talk to my lawyer I can't even talk about my case.

Q Were you getting regular showers in mid-August before [415] August 26th?

MR. SCHAARS: Objection, Your Honor. Regular showers have nothing to do with this case.

THE COURT: I will permit the question.

THE WITNESS: No.

BY MR. DRURY:

Q How many showers were you getting a week, sir?

A About—I'd say it might—like usually I am—well, I'm going to tell you about me. Personally, I only got showers, I might get them twice a week if a visitor be on.

Q Okay. Now my question is concerning these fires. You stated that fires were started. From previous testimony you have heard that they were started with sheets and pillowcases and towels. Is that correct?

A Yes, that is correct.

Q How long would they be allowed to burn?

A Like I seen a fire burn, I seen a fire burn 24 hours.

I tell you I seen it, because I know. I participated, but I seen it.

Q Would the officers attempt to put them out?

A No. You got an officer. He comes down there. You can't put no fire out when you got people like—you put a fire out—he comes down with a water pitcher, right. He just put enough out and that the thing ain't no bigger than this. It holds water. Man, what do they do. They put the [416] fire out. Okay. They put—say if it is a blanket burning, they put the blanket out. They know the blanket's going to stink up the block. There's no ventilation, but it can't go in the officers booth, but if it is sheets, paper, pillowcases or something of that nature, they let it burn. Same thing like this here. It is going to burn. We're back here. We can't feel it. When it stops burning then the smoke is on you all. See, I have

smoke in my nose, in my face, in my clothes, you know.

Q Have you ever seen any inmates taken out for smoke inhalation?

A I have seen quite a few.

Q During this three day period in August did you see any inmates being taken out?

A Nope.

Q Were there any inmates from your knowledge who were sick because of the smoke?

A Quite a few.

Q Can you explain this occurrence that happened on August 16, 1976 when the cleaning crew refused to come into the cellblock?

A August 16th Officer Bimbo, he bring about six inmates in. The dorm all messed up. You have trash, fire, you got food. Well I mean like food—not like a piece of bread. You got food stacked up like this here. You got fires, rags [417] all over the bars where they have been burned. You got, you know feces, human feces all over the floor, piss, everything on the floor.

So, the people come in. They say, "Man, I ain't cleaning it up." 'It ain't my job.' Bimbo say, "You go in." They say, "Man, I ain't going in there." 'I ain't cleaning it up.' 'Take me off detail.'

Q These are inmates who have some type of—

A They got paid for working and all of that.

Q And they refused to go in?

A Right.

MR. DRURY: I have no further questions, Your Honor.

THE COURT: Mr. Walker, have you questioned the witness?

THE DEFENDANT WALKER: Yes.

THE COURT: Mr. Schaars.

CROSS-EXAMINATION

BY MR. SCHAARS:

Q Mr. Cooley, do you recall being apprehended after your escape?

A Yeah, I recall.

Q Do you recall what day that was?

A I think it was the 23rd of September.

Q How about September 27th, would that be more accurate?

A I think it was the 23rd of September.

[418] Q Did you surrender yourself at that time?

A No.

Q Did you call the FBI and invite them over to your apartment so you could be arrested?

A Nope.

Q Do you know how to use a telephone?

A Do I know how to?

Q Yes, sir.

A I'm not going to answer that because it is very silly.

Q Do you know how to use a telephone?

A I'm not going to answer that question. It makes me look like a fool and you look like a fool for asking it. But I know how to use it.

Q Do you know what the numbers 911 mean on a telephone?

A No, I don't.

Q Do you know how to call the police?

A No.

Q Do you know of the existence of the Metropolitan Police force?

A Yes.

Q Have you ever been arrested by them?

A Yeah, I been arrested.

Q Did you know of the existence of the Federal Bureau of Investigation prior to your arrest?

[419] A I know they exist.

Q And that is who arrested you, is that true?

A The warrant squad arrested me.

Q Were there any FBI agents there?

A I don't know. They all had suits on.

Q You saw Agent Colvert come in and testify?

A I don't know him.

Q Never saw him before in your life?

A I never saw him before.

Q He wasn't present when you were arrested?

A I never saw him before.

Q Who forced you to leave jail?

A I'm not going to do that no more. You see, you ain't going to get—

Q Who forced you to leave the jail?

A I'm not going to name them no more.

THE DEFENDANT WALKER: Objection, Your Honor. He said he wasn't going to do it.

BY MR. SCHAARS:

Q Was it Mr. Bailey?

A (No response.)

MR. SCHAARS: I don't believe the witness has the option at this point in declining to name anybody.

THE COURT: You may answer the question.

THE WITNESS: I'm not going to name them. That is [420] my answer.

THE COURT: All right. Ask your next question.

MR. SCHAARS: I would ask to approach the bench.

THE COURT: I can take action. Go ahead.

BY MR. SCHAARS:

Q Now, when you were forced to leave the jail how many people threatened you?

A Numerous of people.

Q Was it more than two?

A Numerous of people.

Q Was it more than two?

A Numerous of people.

Q Was it more than two?

A Numerous of people.

Q Mr. Bailey, [sic] would you answer the question?

A I am answering.

MR. ROBBINS: Objection, Your Honor. He has answered the question.

THE COURT: I think that is sufficient. Ask your next question.

BY MR. SCHAARS:

Q Was it more than three?

A Numerous of people.

MR. SCHAARS: Your Honor, I respectfully suggest that is not an answer. Mr. Cooley can sit here and play games all [421] day.

THE WITNESS: Well, I—

THE COURT: I understand.

MR. ROBBINS: I object to that characterization. Mr. Schaars is playing games as well with Mr. Cooley.

THE COURT: Well, gentlemen, we will have no colloquy between counsel.

BY MR. SCHAARS:

Q Mr. Cooley, were there any correctional officers in the bubble at the time that you escaped?

A Yep.

Q Did you shout out to them that you were being threatened?

A They was in the bubble.

Q Did you wave to them at all?

A They was in the bubble.

Q Could your cell be seen from the bubble?

A Yes.

Q Did you wave to them at all?

A I wasn't in my cell.

Q Did there come a time that you left your cell that morning?

A They opened my door.

Q When you walked out that door had you been threatened before you walked out the door?

[422] A I already answered that.

Q I don't recall that you did, Mr. Cooley.

A I answered that once. You asked me that earlier. I answered it. I know what I said. I answered it.

Q Were you threatened before?

A I told you I was threatened and I answered the question.

Q Mr. Cooley, all I'm asking is: Were you threatened?

A You asked a question and like I say you ain't got to keep on asking. I'm not going to answer it no more. You're playing games.

MR. SCHAARS: I would ask that the witness—

THE WITNESS: I'm trying to answer your questions. My stomach hurts and I don't feel good. You keep asking the same questions over and over again.

THE COURT: This is a question that hasn't been asked before. You haven't answered it.

Ask the question again.

BY MR. SCHAARS:

Q Were you threatened before you left the cell?

A Was I threatened before I left the cell? Wasn't nobody out there.

Q Yes, sir. So, it was after you left the cell that you were threatened?

A Right.

[423] Q At the time you were threatened were you out of a cell or were you in another cell?

A What's that mean? Was I out of a cell into another cell?

Q You have indicated that you weren't in your—that when you left your cell you hadn't been threatened, is that correct?

A Right.

Q Now, were you threatened while you were in the open area, the hallway or were you in another cell when you were threatened?

A I was in the hallway.

Q And from where you were in the hallway could you be seen from the bubble?

A If the officers was looking.

Q But there was a line of sight from the bubble?

A But they wasn't looking.

Q That isn't what I asked you.

A But they wasn't looking. I'm telling you what you asked. You asked could I be seen. I told you they wasn't looking.

Q If they had been looking could they have seen you?

A Yeah.

Q Now, sir, when you left the jail did you stay in the company of the people who you left with or who left about the [424] same time?

A I was by myself.

Q You didn't stay with Mr. Bailey or Mr. Walker?

A I was by myself.

Q Were the people who threatened you with you as you left the jail?

A I was by myself.

Q You testified, Mr. Cooley, that you didn't really attempt to try to escape before this time at all because you were going to sue, is that correct?

A That is right.

Q So, are you testifying today that it was the threats alone that made you escape?

A All of the threats. In general the treatment and the threats.

Q Well, Mr. Cooley, if you said it was the threats from your fellow inmates that made you leave on that particular day, if I said that, would the be accurate?

A I answered that once.

Q Who left with you?

A I just told you now. I'm by myself.

Q Do you know who left at about the same time?

A No, I don't.

Q Do you know whether or not the people who threatened you left?

[425] A No, I don't.

Q In August of 1976, when this pile of rubbish was in the jail, do you know how it got there?

A Inmates put it there.

Q The food too?

A Everything.

Q Everything was put there by the inmates?

A Fires, food.

MR. SCHAARS: I have no further questions, Your Honor.

THE COURT: Mr. Robbins?

REDIRECT EXAMINATION

BY MR. ROBBINS:

Q Just to clarify once again, Mr. Cooley, why didn't you call the police or the jail after you left the jail?

A Well, I told you before. I was afraid.

Q Who were you afraid of?

A I was afraid that one, if I called them I might get hurt. Then I was afraid again if I called them I still might get hurt. See what I'm saying?

Q Yes. But who were you afraid of?

A Mostly I was afraid of the prison guards. I know they don't like me.

Q And what—if you called them what did you feel would happen?

[426] A I felt as though if I called them, said come get me. I felt as though they might come, but I might not go back to the jail.

Q Where did you think you might go?

A See, man, like they threatened to kill me. They even told my sister. They come to see somebody else and they told me, the police—

MR. SCHAARS: Objection, Your Honor, this is hearsay.

THE COURT: Yes. Sustained.

THE WITNESS: Well, I think they would have done something to me like they said they was going to do something to me anyway.

BY MR. ROBBINS:

Q Why did you leave your cell on August the 26th?

A They let me out.

Q Why did you leave the jail?

A I was made to leave.

Q By whom?

A I already answered that.

Q Would you answer it once again to clarify it for the Court?

A I already answered that. It is on the record.

MR. ROBBINS: I have nothing further, Your Honor.

THE COURT: All right.

MR. DRURY: I have no questions, Your Honor.

* * *

[428] DR. SAMUEL L. BULLOCK

was called as a witness by and on behalf of the defendant Bailey and after having been duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DRURY:

Q Doctor, my name is John Drury and I represent Clifton Bailey. Could you please give us your full name?

A Samuel L. Bullock.

Q What is your occupation, sir?

A Physician.

Q Where are you employed?

A The Department of Corrections.

Q How long have you been a doctor?

A How long have I been, what?

Q A doctor, sir.

A Oh, 37 years.

Q That is all?

A That is all.

MR. DRURY: Your Honor, I will stipulate that Dr. Bullock is an expert on the treatment of wounds and injuries, and that he is a qualified physician.

MR. SCHAARS: Your Honor, we would of course stipulate to the same thing. I would ask that each of these gentlemen [429] do as well.

THE DEFENDANT WALKER: What is the question, Your Honor?

THE COURT: Will you gentlemen stipulate that Dr. Bullock is qualified to give a medical opinion?

THE DEFENDANT WALKER: Yes, I have no objection.

MR. ROBBINS: No objection, Your Honor.

THE COURT: All right, you may proceed.

* * *

[437]

CROSS-EXAMINATION

BY THE DEFENDANT WALKER:

Q Mr. Bullock, you are the chief medical officer for the D.C. Detention Center?

A Chief medical officer.

Q Chief medical officer?

A Yes.

Q Do you recognize this folder?

A No. Yes, I recognize the stuff in there.

Q What is that?

A This is our medical jacket. We keep medical jackets on our residents who complain of being ill.

Q All right.

Your Honor, I'd like to introduce this into evidence.

MR. SCHAARS: Your Honor, we have no objection to the pertinent points of that jacket which are Mr. Walker's medical [438] record from the District of Columbia Department of Corrections being introduced in this case.

THE COURT: Would you like to look at it?

MR. SCHAARS: I have seen Mr. Walker's, although I haven't had the opportunity to see Mr. Bailey's.

THE COURT: All right. It will be received.

THE DEPUTY CLERK: Defendant Walker's Number 2 received in evidence.

(Whereupon, Defendant Walker's Exhibit Number 2 was received in evidence.)

BY THE DEFENDANT WALKER:

Q Dr. Bullock, first I'd like to direct your attention to this particular document which is entitled, "History;" would you explain to the Court what this is, please?

A This is a history that is given by the patient upon interrogation.

Q And, according to this document, did I complain of any illnesses?

A You have no complaint of an illness in there, no.

Q What is that?

A It is a history. You had had an epileptic seizure.

Q All right. And, according to these records was I consequently given any type of medication for those epileptic seizures?

[439] A You were given medication on a trial basis.

Q On a trial basis. How long was this medication given on a trial basis?

A Well, I will look at what we have here. This whole thing should not exceed 20 days.

Q According to the records here, did it exceed 20 days?

A I have no way of determining at this point.

Q What type of medication was I being given?

A The medication ordered was Dilantin and Phenobarbital.

Q Would you repeat that, Doctor?

A Dilantin and Phenobarbital.

Q What is the purpose, or just what does Dilantin—what is Dilantin-Phenobarbital used for?

A It is used predominantly for epileptic seizures.

Q Now, you said that I was being given Dilantin and Phenobarbital on a trial basis?

A Right.

Q Now, on this trial basis—how is this trial basis conducted? Was I supposed to have taken medication for a certain period and then be rechecked?

A Exactly right.

Q According to these records was I rechecked?

A I can't see whether it was rechecked or not. I haven't looked at it.

Q Would you look at it, please.

[440] A All right.

THE COURT: Take your time, Doctor, and examine the records.

THE WITNESS: All right.

We're talking about December 15, '76, now.

THE COURT: Of '76?

THE WITNESS: 1976.

THE DEFENDANT WALKER: I'm speaking of June, when I first entered the D.C. Correction Department, June 26th.

THE WITNESS: All right. He was ordered Dilantin-Phenobarbital on June 13th. There is no cutoff date on that, on that particular—

BY THE DEFENDANT:

Q Let me ask you something, Dr. Bullock. What are these dates?

A These are the dates that he apparently received the medicine.

Q What is the first date on here that I received the medicine?

A Received June 15th.

Q What is the last date on there that I received it?

A 8-27.

Q So, that is much more than 20 days, from June 6th until—

A August the 8. We were talking about December, '76, [441] counselor.

Q That is what we were talking about at first. From what you have seen of the records now, would you say that I was being given Phenobarbital or Dilantin or whatever it was, on a regular basis or on a trial basis there?

A This still is a trial basis. We have no evidence that Mr. Walker had any—was even an epileptic.

Q So, in other words I would have been given the medication permanently, according to what the records say, and you would have never have known since I was never being rechecked, is that true?

A No, not necessarily. You went in on the 13th of July.

Q I was what?

A You were in on the 13th of July.

Q I was in?

A In.

Q What do you mean by "in"?

A You came into the infirmary. You were on sick bay that day.

Q For what?

A You had gotten injured in a basketball game.

Q Are you talking about the epileptic problem?

A I don't have any other information on here, more than what we just read.

Q All right, Doctor. What I'm trying to get at is this: [442] You say that I was being given Dilantin and Phenobarbital. I was supposed to have been given this on a 20-day trial basis.

A No. You're wrong. I said that when we were talking about December of 1976. We are back to July now.

Q Oh, so in other words in December it was a 20-day trial basis?

A Exactly.

Q What is it now?

A There is no evidence that this is in the record here.

Q In other words, the person can come into the D.C. detention facility and give a personal report of epileptic, of some type of illness he has, and receive medication indefinitely?

A No, that is not right.

Q But your records indicate that I received medication from the time I entered the jail until the time the alleged escape took place.

If the medication is on a trial basis, what type of criterion is set up for the trial basis to end for an inmate, to be rechecked, as far as the medication that he is taking if you're not sure that there is nothing wrong?

A Maybe you escaped before your trial basis was up.

Q I'm asking you how long is the normal trial basis?

A There is no rule of thumb. It depends upon the [443] doctor examining things.

Q You confuse me, Doctor Bullock. In other words, you're saying that there is no specified time limit for a person to be on a trial basis as far as taking medication is concerned?

A Except what the physician thinks about it.

Q In other words—

A He might determine that it is five days. He might determine that it is six months. It depends on the doctor.

Q In other words, I could take the medication six months before being rechecked?

A I say it depends on the physician.

Q But I'm saying, would it be possible for me to take that medication for six months without being rechecked?

A Anything is possible.

Q According to the practices.

A According to the practices, I thought I answered that. It depends upon the individual physician. We treat people one at a time.

Q So, in other words there is no criterion set up?

A I said there is no rule of thumb.

Q So, in other words, you're telling me that I was in fact taking medication for three or four months for an illness that had not been diagnosed?

A Wait a minute. If you have got all of this you had [444] here—you only had it for how many days, one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen days.

Q Aren't there other medical records for when a person is receiving that Dilantin, a person is assigned the—

A I don't have that record.

Q I understand that you don't have it.

A This is it.

Q Is there another record of me receiving Dilantin?

A When is this now? You're not interested in that one at all.

Q Don't tell me what I'm not interested in.

A It is November 18, 1977.

Q Hold up, Doctor. Let me regroup myself. May I indulge the Court for a minute, please?

THE COURT: Yes, the Court will indulge you.

MR. SCHAARS: Your Honor, may I see Mr. Bailey's medical record?

BY THE DEFENDANT WALKER:

Q Dr. Bullock, considering the erratic method that I was given medication, would you consider this a normal practice the way that I was given medication here or would you consider that negligence on the part of your doctorial staff there?

A I consider the way it is recorded here it was given in good form.

[445] Q All right.

What did you say about you do it with some for thumbs down or as far as the method you use for giving out medication?

A I didn't mention anything about thumbs at all.

Q I thought you did.

A I'm sorry, you're incorrec-tion.

Q Did you on occasion, to your recollection, or did any of your staff, treat any inmates for smoke inhalation during the summer of 1976?

A I don't remember.

Q To your recollection you didn't?

A I don't remember, I said.

Q That is to your recollection. All right, Your Honor, no further questions at this time.

THE COURT: Mr. Schaars?

MR. SCHAARS: I wonder if I might have a moment with Mr. Bailey's medical record?

THE COURT: Yes.

CROSS-EXAMINATION

BY MR. SCHAARS:

* * *

[454] Q Doctor, I'd like to take you through the same sort of review of Mr. Walker's file, if we might, sir.

Again, we are concerned primarily with the period July and August of 1976.

MR. DRURY: Mr. Schaars, may I look at this?

MR. SCHAARS: It is up to the Court.

THE COURT: It is in evidence.

MR. SCHAARS: Your Honor, if this might be marked as subpart of Defendant Walker's Exhibit 2, perhaps 2-A.

THE DEPUTY CLERK: Defendant Walker's 2-A marked for identification and received in evidence.

[455] (Whereupon, Defendant Walker's Exhibit Number 2-A was marked for identification and received in evidence.)

BY MR. SCHAARS:

Q Now, sir, could you identify what has been marked as Defendant Walker's Exhibit 2-A?

A 2-A, the Dilantin-Phenobarbital tablet, four times a day.

Q How many times, sir, was that medication prescribed in July and August or received in July and August?

A Twelve times according to this record, here.

Q Does that record indicate receipt of medication or the sending of medication to the cellblock or what?

A That record reflects he received the medication.

Q I see. Now, sir, I'm going to direct your attention to the card below Defendant Walker's Exhibit 2-A. What medication is indicated on that?

A That is Dilantin-Phenobarital continued.

Q Continued beyond what, sir?

A From this date here.

* * *

[456] Q Now, it indicates on here—what is this, sir?

A Take Dilantin for seizures.

Q Now, why would that be written on there?

A This was taken by either another inmate or an M.T.A., not a doctor.

Q Is the information that is contained on a history form such as this, based upon what the inmate tells the medical staff?

A That is right.

Q So, if the—for example in this case, it indicates [457] age of 27, is that based upon the inmate telling the hospital that?

A That is right.

Q It also indicates that there is no drug problem at all with this particular individual, is that correct?

A Right.

Q That is based upon what the inmate tells you?

A That is right.

Q When it says, "Take Dilantin for seizures," would the inmate have told whoever filled this out that that is the medication he received?

A I assume he would, yes.

Q By, "seizures," are you able to determine whether this is any particular type of seizure?

A No, I'm not.

Q Just, "seizure". That would have been what the inmate told the member who filled this form out?

A Right.

Q Now, sir,—

A June 13th.

Q 13th, what is this, sir?

A This is the—when the inmate is seen by the doctor.

Q All right. Does this indicate a doctor's evaluation of that patient's condition?

A Exactly, right.

[458] Q On June 13th what evaluation, if any, was made?

A The doctor who saw him at this time, according to the log, maintains history, he ordered Dilantin-Phenobarbital, three times a day.

Q Is that something you indicated earlier, something to be given to someone who stated a history of epileptic seizures?

A It might.

Q Is there any reflection on this particular form of a diagnosis of epilepsy?

A Yes, he said, "Possible epileptic, history of narcotic conviction."

Q But, there is a possible diagnosis of epilepsy. Is that why this is given, based upon your interpretation of the record?

A Yes.

Q The dosage indicated one-quarter gram. You talked earlier about a trial basis for medication.

A Right.

Q If one is actually diagnosed positively as an epileptic, is the same dosage given?

A Well, it may or it may be more than that. It might be even less, really.

Q It depends upon the extent of the illness and the severity of the illness, I take it?

[459] A And on the total picture.

Q And when one prescribes something on a trial basis, is the attempt to hit a plain so if there is epilepsy it can be controlled by the—

A Exactly.

Q That is the reason for giving a trial medication, sir?

A It is hard for us to keep track of them unless we do that.

* * *

[467]

CLIFFORD BAILEY

was called as a witness and on his own behalf and after having been duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DRURY:

Q What is your name, sir?

A Clifford Bailey.

Q How old are you, sir?

A 35.

Q Where do you reside at present?

A 1901 D Street, Southeast.

Q When were you first brought in the year of 1976 to the new jail?

A I believe it was in June.

Q The early part or latter part?

A Early part.

Q Where were you brought from?

A Leavenworth, Kansas.

Q Why were you brought here?

A On a writ to testify in the Brad King case.

Q Where was the Brad King case pending?

A In the United States Superior Court.

Q That would be for the District of Columbia, across the street?

A For the District of Columbia, yes.

[468] Q Who requested your presence here?

A Brad King's attorney.

Q Do you know his name?

A No, I don't. I don't remember.

Q Did you give testimony?

A Yes, I did.

Q What charge was Brad King charged with?

A First degree murder.

MR. SCHAARS: Objection, Your Honor. It is irrelevant.

THE COURT: Yes, it is irrelevant.

BY MR. DRURY:

Q When was that testimony given?

A In July. I believe, I'm not sure, I can't say for sure.

Q Early part or late part, sir?

A I can't even be sure if it was July.

Q Were you ever approached by anyone at the D.C. Jail of the staff concerning that testimony?

A Yes, I was.

Q I'm not talking about inmates. I'm talking about staff people, authorities.

A Yes, I was.

Q Did anyone ever state to you that they knew that you came here to testify in the Brad King case?

A Yes, they had.

[469] Q Who were these people who talked to you about your testimony in the Brad King case?

A Major Long, Officer Webb, Captain Dickinson.

Q What did they say to you?

A Major Long—he threatened my life, along with Officer Webb and Captain Dickinson, mentioned the same thing, concerning that if I was to testify in this case that I would never leave the jail alive.

So, I asked what did he mean. He said, "He'd leave me hanging like the guy that was left hanging in the Brad King case," and this guy was killed.

Q After your testimony in the Brad King case, from your knowledge, was there—how much time elapsed between that date, this is going to be an approximation, and the time that you—of August 26th? How much time elapsed between your testimony, if you can recall, and the time of August 26th?

A I can't recall exactly.

Q Would it be weeks or months?

A I couldn't be precise.

Q Was there ever any attempt by the authorities to move you back to your institution, Leavenworth?

A No, there wasn't.

Q Did you ever make any request to go back to your institution, Leavenworth?

A Several occasions.

[470] Q To whom?

A To Mr. Robertson.

Q Who is that? Mr. Lester Robinson?

A Mr. Lester Robinson.

Q He testified earlier today?

A Yes. I think after my testimony, it might have been about six weeks. I'm not positive, but you could get the record and it would show.

Q When you came to D.C. Jail, the new D.C. Jail, were you placed immediately in dead lock or Northeast 1?

A No, I wasn't.

Q Where were you placed?

A Southeast 3.

Q And, is Southeast 3 less secure?

A Yes, Southeast 3 is the unit where you have recreation permitted, to make phone calls, permitted to shower whenever you choose, permitted to watch television and listen to the radio.

Q Are you permitted visits?

A Go to the commissary and permitted social visits. You have all of your privileges on Southeast 3.

Q What other privileges would you have on Southeast 3, sir?

A No, no. It wasn't Southeast 3. It was Northeast 3. Northeast 3.

[471] Q Northeast 3?

A Right.

Q What other privileges would you have on Northeast 3?

A You'd have the privilege of going to visitors hall by yourself, with just a pass.

Q Would you be shackled?

A No. No shackles on or nothing.

Q Did there come a time that while you were on Northeast 3 that you received some type of an assignment whereby you could work and receive money?

A Oh, yes. I wasn't in the jail no more than—I couldn't be precise. Now, I don't think it was no more than a week before I was placed on the kitchen detail and I moved to Northeast 2 in the kitchen cell unit and I used to work down in the kitchen. I received privileges

there, I received visitors and I received, I think it was five visits a week instead of four, because by me working in the kitchen you're permitted more visits and the visitors stayed for an hour.

Q Were you paid any money?

A At that time they was talking about having some money.

Q Was anyone on the culinary detail paid money at that time?

A As far as I know, there wasn't

Q Are they now paid money?

A I couldn't say for sure.

[472] Q Did there come a time that you were taken off of this culinary detail or kitchen detail?

A Yes, there was.

Q Who informed you that you were taken off?

A Captain Dickinson.

Q Did he tell you why?

A After he got into my cell he came to my cell with several other officers.

Q This is Northeast 2?

A Northeast 2, the detail unit for culinary men and laundry men and other detail men that work around in the jail.

Q Okay. Now, I don't mean to interrupt you, but do I understand that Northeast 2 is the section of the northeast building that contains the help that does work around?

A Yes. Yes.

Q Is this contained right above the floor that we have referred to so often in this trial as Northeast 1?

A Yes, it is.

Q And I interrupted you by asking that question. Captain Dickinson came to your section and asked you a question or told you something?

A He came to my section, which is Northeast 2 with several officers and called me out, out of my cell and told me to pack my property. I asked him, "What for?" He said, "We're moving you." I said, "What you moving

me, for, man?" I said, [473] "I don't have no disciplinary report." He said, "Get your stuff we're moving you." So, he took me to Northeast 1 and placed me on dead lock. And he explained to me after the officers walked away, after I was placed in my cell, the officers walked away and he explained to me—he said, "I'm just letting you know this is the example of what you'll be getting if you testify in the Brad King case." 'Now, this is just to let you know what I can do.' 'You know now I'm not going to show you what I can really do until after I see what you do on the stand, if you take it.'

Q Now, was this action taken before your testimony in the Brad King case?

A Yes, it was.

Q How soon thereafter did you testify in the Brad King case?

A I can't recall.

Q You can't recall, sir?

A You know, like I can't say. I couldn't be precise.

Q Okay. Let me proceed now. After you were removed from Northeast 2, removed from your job, you were placed in Northeast 1. Were you ever informed, officially by a procedure that had been set up with all of the disciplinary procedure, what had occurred?

A Oh, yes. They called me down to the disciplinary board sometime afterward and explained to me that a letter had [474] been written that stated that I was supposed to have been going to escape. So, I requested that I be given a lawyer. You know, to defend myself, given a lawyer to help defend this charge that they were placing against me. They told me that I didn't have a right to receive a lawyer. It was a simple case. They wasn't going to give me a lawyer. If I had a lawyer myself and I explained to them I didn't have a lawyer, would they give me enough time to obtain a lawyer. They said, "We got this report that you're supposed to be going to escape from the jail." "This is the reason we placed you on dead lock."

I said, "Well, would you investigate it"? 'All I'm asking you to do is just investigate it.' 'Appoint me a lawyer.'

They searched me. They searched my cell. They didn't find any instruments of a crime to show that I would escape. I didn't have any money. I didn't have any tools or anything, no hammers or anything.

Q Okay. Now, let me ask you this question: You had come from Leavenworth?

A Right.

Q How long prior to this date in the year of 1976 did you have any cause to have a lawyer in the District of Columbia either appointed by the Court or retained by you?

A No.

Q Did you know any lawyer?

[475] A No, I didn't.

Q Did you ever talk to the lawyer in the Brad King case before this happened?

A No, I didn't.

Q Was there a finding made at that disciplinary board hearing?

A No. They told me that they would investigate the situation concerning the alleged, supposed to have been escape. I'm still waiting on that investigation to clear up.

Q While they were investigating it were you transferred back to your work detail?

A I remained on dead lock.

Q Okay. After that, did there come a point in time that some fighting incident occurred?

A Yes. Now, this incident I remember in specific, because it was the day I was coming from court after testifying in the Brad King case, or it was the day I—one of the days I went up to court to testify or even was interviewed by Brad King's lawyer. I can't be precise whether it was to talk to his lawyer or to testify in the case, but I remember coming back and coming back one of the officers—I don't know, I'm not going to say that he put this convict up to hit me—

Q Tell us what happened.

A We was walking up the hall. We had left the R. and D. and was going back to the cell. We was going back up to Northeast [476] 1. This officer—I mean this convict

hit me in my face, so I hit him back, and this Officer Graves, he ran up and started beating me with one of the slapjacks.

Q What is a slapjack, describe it for the jury?

A It is a little black piece of leather with some steel inside of it, I believe, I don't know what is inside of it. They beat you with it.

Q Okay.

A They put some kind of—they put it on their hand and hit you with it. So, this officer started hitting me. I hit him back. The officer, Officer Graves ran up, started beating me with his fist. He beat me down to the ground. Carl Dickson was being escorted with me. He persuaded the officers to stop them from beating me. He explained to them he'd kill me if he continued beating me in the head. I was on the ground. I just got up, looked at them and didn't say anything else.

Q Now, did there come a time that because of this incident you were brought before another disciplinary board?

A Yes, they took me before a disciplinary board and said that I was fighting with another inmate. So, I tried to explain that the inmate hit me and I hit him back, and I explained what Officer Graves had done to me. You know, I explained that. I explained the situation to Captain Dickinson, told him I wanted to call the lawyer, wanted the matter to be [477] investigated. He took me to my cell and told me he would look into the matter.

Q Do you remember a fire occurring on June 26, 1976 where a Lieutenant W. R. Johnson, supervisor of the third shift was present?

A Now, I'm not going to say that date, because I couldn't be sure, but I will say this: I remember Lieutenant Johnson was present when Officer R. Brown hit me in my head with a flashlight and threatened to kill me and I asked him—I explained to him that this happened. See, he wasn't present when this took place.

Q Okay.

A He came up as I was getting up off of the floor, like. The cell unit—like once you go to the door, if someone is coming down the hall they can't see you inside of

the doorway, so I just stepped inside the unit and this officer hit me from behind with a flashlight, knocked me down. As soon as I got up, you know, I went to the booth to explain to the officers in the booth and Lieutenant Johnson was there.

Q Okay. Now, you have testified to two incidents of fighting, is that correct?

A I don't call that a fight.

Q Now, you referred to the incident where Officer R. Graves and you had an altercation and that is one incident?

A Officer Graves assaulted me.

[478] Q Well, an altercation, is a fight or argument. You have also referred to a fight that Officer Johnson was present, and that Officer Brown and you got into a tussle. Now, these are two separate incidents, is that right?

THE COURT: Let's correct the record on that. That was your question. He said Lieutenant Johnson was not present.

MR. DRURY: I believe, Your Honor, if I might clarify.

BY MR. DRURY:

Q Did there come a point in time that Lieutenant W. R. Johnson came upon the scene?

A He came upon the scene.

Q And you complained to him?

A I asked him would it be investigated. I explained to him I wanted to call a lawyer. I wanted this matter to be investigated. I asked him for an immediate phone call and he denied everything, told me to return to my cell.

Q Now, I have had marked as Defendant's Exhibit Number 7, and it has been moved into evidence, a document that Lester Robinson, Assistant Administrator of Operations has identified as being kept in the business of the jail, and I want to read this document to you. Mr. Schaars has seen it and I want you to agree or disagree with the nature of this incident.

A Okay.

Q This is by W. R. Johnson, Lieutenant.

"On this date while making my rounds, [479] I was coming out of Northeast Level 1, when at the same time Officer Brown was coming in with Bailey. Bailey said, 'Lieutenant, this man been threatening me, to the infirmary and back.' He then said write a report and give me a copy now. I told resident Bailey I would not write a report, because of his statement. He then replied, 'Okay, I see where you are coming from.' 'So when I kill one of you officers then they will do something.' He then said the two officers in the block heard Officer Brown threaten him. I asked the officer . . ."—apparently, Officer Brown— ". . . one at a time, both said, 'No'. He asked three or four residents did they hear the officer threaten him, they said 'Yes,' he threatened the man which was Bailey. I told Bailey to go to his cell, and I would investigate this matter some more. Resident Bailey responded by saying, 'Let me call my lawyer, I want to press charges.' I told him no phone calls on Saturday and Sunday. He said, 'You are a lieutenant, order him to let me make a call.' I told him no and to go to his cell, he said, 'Well, if you can't do that, let me square off with him, I know you got the power to do that.' I told him again to go to his cell, [480] he started. He turned around, came back and said something to Officer Hammond. I was in the control booth at that time. Officer Hammond came to the booth and said resident Bailey was not going back to his cell. He wants you to get the M.T.A. up here to check Jamison's back. Officer Armstead picked up the phone, I told him (Bailey) to go to his cell. He went in.

"I request that when they have to be escorted, let two officers escort one. I also request that they do not be out at the same time for anything."

Is that a fair representation of what occurred?

A Some of it is.

Q Okay, now that incident along with the other incidents that you referred to, did there come a time that you had a hearing before the board?

A On this particular incident you're speaking of now?

Q Yes, let's call that the Brown incident.

A I can't say.

Q Did there come a point in time that you had a hearing on the Graves' incident?

A I was given a disciplinary report.

Q Now, disciplinary report is one thing, a hearing is another. Did you have a hearing with Mr. Robinson present?

[481] A Yes.

Q And, did you tell him about the assault that Officer Graves had committed on you?

A Yes, I explained it to him.

Q What did he say?

A He didn't say anything about it. He said, "We're not going to deal with that." "We're going to deal about the fight you had with the other inmate."

Q Was Officer Graves there?

A No, he wasn't.

Q Did you ask them to investigate it?

A Yes, I did.

Q Did they ever investigate it?

A Not to my knowledge.

Q As a result of the assault from Graves, did you take any legal action on your own?

A Well, like I had explained to Officer Robinson—

Q You mean Lester?

A Lester Robinson. I explained how I tried to go to Major Long with it. I tried to go to Captain Dickinson with it, you know, but they continued to tell me what would happen if I testified in the Brad King case. As a result, that I would not receive any investigation or any assistance from them. I filed litigations in Superior Court against Officer Graves.

[482] MR. DRURY: Mark these please.

THE DEPUTY CLERK: Defendant Bailey's Exhibit 10 marked for identification.

(Whereupon, Defendant Bailey's Exhibit Number 10 was marked for identification.)

BY MR. DRURY:

Q Did you have a lawyer on the case that you filed?

A No, I didn't.

Q I showed this to counsel.

I show you what has been marked as your Exhibit Number 10, and ask you whether you can read that?

A Yes.

Q Tell me what it is.

A These are documents that were sent back to me from Superior Court notifying me that my writ against Officer Graves had been received and that they was sending me the forms to fill out in forma pauperis and that a motion had been granted, and all I had to do was fill out the summons and the subpoenas and send them back to the U.S. Marshal for service against the people that I was charging responsible for Officer Graves' action against me.

MR. DRURY: May I have this moved into evidence. Your Honor?

THE COURT: Do you wish to be heard on it?

[493] MR. SCHAARS: Your Honor, I would just like to see it one more time.

THE COURT: All right.

MR. SCHAARS: Thank you, Your Honor.

MR. DRURY: Your Honor, for purposes of identification, there are three separate exhibits here, but this will all be referred to as Bailey's Exhibit Number 10.

THE COURT: It will be received.

THE DEPUTY CLERK: Bailey's Exhibit 10 received in evidence.

(Whereupon, Defendant Bailey's Exhibit Number 10 was received in evidence.)

BY MR. DRURY:

Q Now, very briefly, Mr. Bailey, I'm going to turn the page. I'm going to move to the last set of papers here, which is a handwritten page, series of pages and what is this, sir?

A This is a writ that I filed against Officer Graves. This is a writ, really that I filed against Officer Graves, but I also filed it against his superiors for his actions.

Q Okay. And it is—you called it a writ, but really it is a petition or complaint.

A Petition or complaint.

Q This is a civil action pending in Superior Court, is that correct?

[484] A Yes, it is.

Q And, you are asking for damages in this case?

A Yes, I am of \$100,000.

Q Is this notarized by a notary public?

A Yes, it is.

Q Where did you find this notary public?

A At 1901 D Street, Southeast.

Q This is a lady by the name of Doris P. Johnson, who works down there?

A Right.

Q When did you sign this? When did you send it in?

A I signed it on July the 9th, 1976.

Q I see. And you sent it in when?

A I sent it in that day.

Q Okay. Now, as a result of sending this in, did you also receive something back from the Court?

A At a later date the Court sent me some documents.

Q Did you ever receive an answer from the District of Columbia Government?

A Yes. At first I received some subpoenas and summonses. The Court informed me to fill in the subpoenas and return them to the U.S. Marshal's office for filing.

Q I see. And the summonses were requests for people to appear at your trial, weren't they?

A Yes.

[485] MR. SCHAARS: I object at this point. The details of this litigation, I suggest are really not relevant. It is clear that Mr. Bailey has filed a lawsuit.

THE COURT: I will sustain it. It is in evidence.

* * * *

[492] THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Cr. No. 76-735-4

UNITED STATES OF AMERICA

v.

CLIFFORD BAILEY, DEFENDANT

RONALD COOLEY, DEFENDANT

RALPH WALKER, DEFENDANT

Washington, D.C.

March 11, 1977

The above-entitled matter came on for further trial in open court at 9:50 o'clock a.m., before:

THE HONORABLE OLIVER GASCH

United States District Judge, and a Jury.

* * * *

[528]

CLIFFORD BAILEY

was called as a witness by and on his own behalf and after having been previously sworn was examined and testified further as follows:

DIRECT EXAMINATION—continued

BY MR. DRURY:

[529] Q Mr. Bailey, are you familiar with the xerox copies and the original record?

A Yes.

MR. DRURY: As his counsel, I would agree to the substitution and turn the original back or I will have Mr. Patterson turn the original back to the jail officials.

THE COURT: Thank you.

BY MR. DRURY:

Q Yesterday, Mr. Bailey, I believe that we ended up with your identifying the suit that you filed and explaining who you filed it against, is that correct?

A I believe so. I know, yes, sir.

Q Speak into the microphone.

A Yeah, I believe so.

Q Now, as a result of that suit did you receive any instructions from the court people at Superior Court who issue subpoenas?

A Yes, I did.

MR. SCHAARS: Objection, Your Honor, as to the relevancy.

THE COURT: Just a minute, please. Go ahead. What was your question, would you repeat it, please?

BY MR. DRURY:

Q As a result of the filing of this suit, did you receive instructions from officials of the Court who issue subpoenas?

[530] A Yes, sir, I sent subpoenas to—

MR. SCHAARS: Your Honor, we have an objection.

THE WITNESS: —Officer Graves and his superiors.

THE COURT: What is your objection?

MR. SCHAARS: As to relevancy. There is no doubt he filed a suit. Whatever that suit is about has been presented.

THE COURT: I think that is sufficient. He filed suit. The papers are in evidence.

BY MR. DRURY:

Q Now, as a result of filing the suit were any comments ever made to you by jail officials concerning this suit?

A Yes, there was, at various times.

Q And the suit was filed, I think you testified yesterday on the 9th of July.

A I believe so.

Q And, what were the nature of these comments and who made them, sir?

A I was approached again, by Officer Graves, concerning it and he was explaining to me that I should withdraw it and if I didn't withdraw it that some of his friends would do something to me, and if I was ever placed in a secluded area, they could lead me off, that they would do something to me. Like I, I would like to state to the Court that I was seized off. They came and requested me to move to Southeast. They told me I was moving to the hospital, from Northeast 1 to the [531] hospital. So, I explained to them that I didn't report no sickness to the doctor, that I didn't talk to no doctor for the whole week. Why was I going to be moved to the hospital? They explained to me that that was the doctor's orders, so I refused to go. So, about maybe nine, or twelve—I couldn't be sure, but it was a number of them that came down to my cell and told me that I had to move. So they took off my door and they came in and it was a scuffle, you know, and they got the best of me. They got me down, put the handcuffs on me, you know, and I was hit several times. They put handcuffs on me and took me out of my cell, took me up to Southeast 3.

Southeast 3 is a mental ward for all mental patients, mostly every individual on Southeast 3 takes medication. I'm not on any medication. I don't have no history of no mental illness, but I'm up on the ward with them. These individuals don't take showers, you know, they don't let them make phone calls. They don't let them have recreation, you know, deny them all of their privileges.

I had to bring to your attention that I had a shower Monday, and that I hadn't had a shower all week. I don't know what you did yesterday, but I was given a shower last night after complaining.

MR. SCHAARS: Objection. Whether this gentleman had a shower yesterday or every day since August 26th is absolutely immaterial to this case.

[532] THE COURT: Well, I think that portion of his testimony is. Get on to something else.

BY MR. DRURY:

Q Now, directing your attention back to the time period after you filed your suit?

A Yes.

Q I asked you originally about the nature of the comments that were directed to you about the filing of the suit.

A Uh-huh.

Q Who made the comments and can you recall when they were made?

A No, I can't recall when they was made, you know, I can't say like what days or, you know, or nothing like that. The times that they was made.

Q Why did you file this suit?

A Because of the abuse from Officer Graves hitting me, like I complained to Officer Robinson, the associate superintendent. I complained to him. I asked for an investigation. I asked to be appointed a lawyer, because they have a lawyer that is supposed to sit with you on all disciplinary proceedings but I was denied the right to have a lawyer. I come down here on a writ. I didn't have a lawyer. I had been away from the Washington area for some time, like my people are unable to hire me a lawyer, so I asked that they appoint me a lawyer. They refused to do so. So, I had to draw up my own [533] litigation.

Q Let me ask you something. You heard the testimony of Lester Robinson, and—

A Yeah, but see—

Q Let me ask the questions, please.

You state that there was a hearing, originally before the Adjustment Board on June 25th, 1976 and that concerning the letter or the report that was made while you were in culinary detail. June 25th or 26th, there was also an Adjustment Board hearing, concerning a charge of fighting on June 29th and through your testimony we have pointed out that there were two fighting incidents. One, Mr. Brown, and one with Mr. Graves. On the 30th of June there was another Adjustment Board hearing. Those were the Adjustment hearings that occurred, how-

ever, as you recall from the testimony of Mr. Robinson, you also had hearings before the Adjustment Board on July 8th, on July 22nd, on August 6th, and on August 20th, is that correct?

A I couldn't say for sure.

Q Do you remember going before the Adjustment Board on a number of occasions?

A Yeah, I did go before the committee.

Q Did you ever have an attorney present with you?

A No, I haven't.

Q Did you request an attorney?

[534] A Yes, I did.

Q Were you ever informed of why you were going to the Adjustment Board all the time?

A No. The officer don't know why. The officer don't know but to come and get you to take you to the Adjustment Committee. He don't know.

Q Did Mr. Robinson or anyone in his employ tell you why you were going?

A After you get in, the Committee, they would tell you just your review. They just say that they are bringing you in the committee room and they: "This is just your 15 day or 14 day review."

Q Now, did you ever ask them to investigate?

A I don't—

Q Let me ask you my question. Did you ever ask them to investigate the original letter that had claimed you were an escape risk being at the review hearings?

A Continuously.

Q Did they ever tell you what the result of these review hearings were?

A No, sir.

Q Did you ever tell or comment to Mr. Robinson or anyone who was at the Adjustment hearings that threats had been made to you as a result of one: the fighting situation with Mr. Graves and as a result of two, your testimony in the Brad [535] King case?

A Yes.

Q Did they comment on that?

A No.

Q Do they have any procedure at the Adjustment hearings, as you heard Mr. Robinson testify, that they have a stenographer take down the words that are said, or a tape recorder that runs—

A They don't have that. They don't have that.

Q You heard him testify the other day that they have some type of a transcript.

MR. SCHAARS: Objection, Your Honor. That is not the testimony of Mr. Robinson.

THE COURT: Sustained. Mr. Robinson said they made notes in the report.

BY MR. DRURY:

Q Did you ever see these gentlemen taking notes?

A They have a gentleman sitting there, he takes some and writes down, but you don't know what he's writing.

Q Now, you made—

A They didn't have—never read anything back to me that this gentleman wrote down or never told me that, "We are writing down what you supposed to have said." I have never seen anything like that.

Q Now, did there come a time after your two fights in [536] July or August, as best you can recall, that a man named Oliver Boling came and talked to you?

A Yes.

Q Now, you know who Oliver Boling is today, don't you?

A Yes.

Q He testified the other day?

A Yes.

Q Do you recognize him?

A Yes, I remember him.

Q Do you know him, personally?

A I don't know him, personally.

Q Is he a friend of yours?

A No, he is not a friend.

Q Have you talked to him prior to coming to trial today or the other day?

A No, I haven't.

Q Where did you see Oliver Boling?

A I first see him on Northeast 1.

Q Did you ever have any extended conversations with him?

A No. We wasn't permitted out of our cells unless we were going on visits or if an individual was real sick and some confusion came about, like we had a lot of times, like I have gotten sick, and they refused to take me to the hospital.

Q We will go into that later. Mr. Bailey, I'm directing [537] my questions to you right now about your contact with Oliver Boling.

A Oh, oh.

Q Now, did you have a time to talk to him at one point?

A Yes, I did.

Q Tell the ladies and gentlemen of the jury how it occurred and what was said.

A He came to my cell one day and he explained to me that two officers that day came to him and told him they was going to kill me so I asked him the officers' names, you know, so he said, "Webb and Dickinson," you know. I asked, "Why did they tell him that," you know? He said, "He don't know." He said, "But they said that they was going to do something to him also." So, I said, "Well, you know what is the reason for them saying that they was going to you know, kill me?" He said, "I don't know, man." He said, "Like I don't want to get involved in it, you know." So, the officer told him to come on, go back to the cell, so he had to go back to his cell.

Q Do you know whether Oliver Boling from your personal knowledge, do you know whether he ever got in any trouble with the guards?

MR. SCHAARS: Objection, Your Honor, as to relevancy.

THE COURT: Sustained.

BY MR. DRURY:

[538] Q Did there come a time that you were ever physically beaten by any of the guards?

A Yes. I was assaulted by Officer Graves. I was assaulted by Officer R. Brown and I was assaulted by Officer Webb. This is the officer that came to my cell with several other officers, and choked me up.

Q Why?

A Didn't give me no reason, just opened my door.

Q When?

A I don't know.

Q Was it prior to your escape?

A Oh, yes.

[541] BY MR. DRURY:

Q You heard Officer Robinson testify that there was an order for special handling of you?

A Yes.

Q Could you please describe to the ladies and gentlemen of the jury what that meant, not according to the rules and regulations that Mr. Robinson read, but according to what you saw, what you felt and what was done to you?

A Um, to me I was locked down 24 hours a day.

Q What do you mean, "locked down?"

A I was locked in a place, in a cell, and the cell was all concrete except for the door, which is a bar, which has bars and it is controlled by the little bubble, they call it, when you can see the officer who would pop open your door from the bubble or lock your door. At no time could you—you know push your door open or come out your door. I had no window, you know, the only opener was the barred door, which was all bars. That was the only opening. The rest of my cell was all concrete, and you're placed in this cell. You're locked in [542] there 24 hours a day.

Now, I did get showers every now and then, various officers would let me take showers, but when I did take showers they had to be specially escort officers to let me take showers. I usually came out—if I had handcuffs on, or leg irons, or I had them both on. If I was escorted to a visit, I had to be leg irons. I had to wear leg irons and handcuffs if I went to the hospital I had to wear leg irons and if I went on an attorney visit, not with this lawyer, but another lawyer—Mr. Drury, you can testify, when I came to see you, you can testify I had leg irons and handcuffs on. I could not write no notes.

MR. SCHAARS: Objection. This is not the period we are talking about.

THE COURT: I sustain that objection. Mr. Drury was talking about the period prior to August 26th.

BY MR. DRURY:

Q We are talking about the summer. Would you explain?

A The conditions never changed. I mean I was under the same thing.

Q Now, you have given that testimony and it is on the record, Mr. Bailey, but I want you to tell the ladies and gentlemen of the jury what did special handling mean in the summer of 1976, even though it may not be any different?

A Special handling means you had to be handcuffed and shackled for any movement outside of the unit.

[543] Q When you say, "The unit," do you mean outside of your cell or Northeast 1?

A Outside our cell, anytime you come outside your cell.

Q Please proceed.

A Anytime you come outside your cell you had to be handcuffed and shackled. Anytime you came out your cell it had to be special escort officers there who had to come and let you out. The officers in the unit had written orders signed by Officer Robinson stating that a specific individual would not be let out of their cell together anytime. The only way they would be let out that they come out by themselves.

Q Now, explain to me this: A leg iron is a handcuff on your leg, right?

A Yes.

Q Tell me and tell the ladies and gentlemen of the jury approximately how far you can extend your leg when you walk?

MR. SCHAARS: Your Honor, I object.

THE WITNESS: Not even 12 feet. The chain is not as long as 12 feet, 20.

BY MR. DRURY:

Q 12 feet or—

A 12 inches. The chain is not as long as 12 inches.

Q And these are placed on your ankles?

A On the ankles, yes. And handcuffs about maybe [544] three or four inches, I guess. You know, I'm just guessing. I don't know.

Q Let me proceed with another section of my inquiry.

There was a phrase used yesterday by, I think Mr. Cooley in which he said, "Rec." Would you please tell the ladies and gentlemen of the jury what recreation was available to you during the summer of 1976?

A During the summer, when I was on Northeast 1, we didn't receive rec. It was very rare, you know, if we did come out for rec, we had to be handcuffed and shackled, you know, and special escort officers had to be in uniform if we came out of rec. But, I don't remember coming out for rec.

Q Where would you have recreation, if you ever had it?

A Inside the unit. See, we never—

Q Out in front of your cell?

A Right. Out in front of the cells. See, we never went out doors.

Q The sun never shines on you in Northeast 1? You would never see the sun.

A It is impossible for you to see the sun in my cell—

Q During the summer—

A —in the summer of '76.

Q Did you ever get outside for a walk in the fresh air?

[545] A I never went outside. The sun never touched me in the summer of 1976.

Q Now, did there come a point in time in late August that you have heard testimony about, that the cell was—or the unit was a particular dirty situation?

A Yes.

Q Can you tell us about when it was?

A Let's see. Like I was on the unit at that time. I can't say the exact date or days that these various incidents took place, but I was on the unit. I do not know that they took place. I took part in quite a few of them, concerning individual visits being delayed for two and three hours at a time, concerning individuals not being

able to eat. They wouldn't serve nothing, none of us food, for a couple of days. They wouldn't take individuals to the hospital who were sick. Had quite a few people down there that was sick, you know, because they wasn't receiving no ventilation, you know.

Q Let me ask you this: During the fires that were started would you tell the ladies and gentlemen of the jury about any injuries arising from the smoke that would occur?

MR. SCHAARS: Objection.

THE WITNESS: There was quite a few victims suffered from smoke inhalation.

THE COURT: Wait a minute.

MR. SCHAARS: I would ask that the witness' response [546] be limited to any injuries which he contends he may have received.

THE COURT: He may answer it both ways.

BY MR. DRURY:

Q Were there fires in mid-August?

A Quite a few fires.

Q Answer my question yes or no.

A Yes.

Q Were you ever the victim of a fire? Were you ever burned in any way?

A The side of my face was burned.

Q Did you ever see any—were you ever the victim of smoke inhalation?

A I was the victim, but I didn't get into the hospital.

Q Did you ever see anyone taken out to the hospital for smoke inhalation?

A See, from where my cell was—

Q Just tell me, could you? Did you see anyone?

A I think one dude. I think.

Q How long were the fires allowed to burn in Northeast 1 or the smoke allowed to rise?

A The whole—like it might be 80 people in Northeast 1, and like I can't say how many would assist in throwing stuff, burning stuff up, but like it would be fires around the whole section. You know, everybody—it would be fires all the way around and like it is hard to

say how long the [547] fires might burn, like maybe an hour. But like the smoke—all of the smoke when the fires go out from the blankets and sheets and stuff, the smoke would settle in the building, because there was no air conditioning, you know.

Q You heard Mr. Robinson testify that there is air conditioning throughout the jail.

A No. See, Mr. Robinson told a story, you know. Like I was down in '68 when Mr. Robinson brought in a shotgun and shot a guy, you know.

THE COURT: Just answer the questions.

MR. SCHAARS: Objection.

BY MR. DRURY:

Q You heard Mr. Robinson testify that there was air conditioning.

A Yes, I heard what Mr. Robinson say.

Q From your experience in Northeast 1, was it ever not running?

A It wasn't running at all when I was there.

Q Now, let me proceed to another section of inquiry. Did there come a time, prior to the date of your escape that—strike that paragraph. Did you leave D.C. Jail on August 26th, 1976?

A Yes.

Q When?

A I think it was August 26th.

[548] Q Can you remember the exact date?

A It was August 26.

Q Was it morning, evening, day, dusk, do you know when?

A It was dark outside. It was still dark outside. I remember precisely, you know.

Q Tell the ladies and gentlemen of the jury in your own words how it came that you left D.C. Jail?

A All of these threats had been placed upon me and various individuals had been telling me that the officers going to kill me, take my life for testifying in the Brad King case, and they showed me what they would do, you know, by what Officer Graves did, what Officer R. Brown did, and what Officer Webb did to me. I was in constant

fear of my life, you know, that I don't want you to think that it is just because of this incident that I was in fear, you know, but like one particular time—I can show you the scars I have. I was beat before, see? I received this. And see, this. And almost died from this. I know them people are serious about when they talk about taking your life. See, there ain't no doubt in my mind about that. I had that much fear in me.

Q Mr. Bailey, tell us how it came you left the jail.

A That morning, they opened my cell door and I was in bed and my door was open.

Q Why did they open your cell door?

[549] A I don't know why they opened it.

Q Was this some particular time of the day that some event was occurring, at that time?

A It was early in the morning.

Q What happened early in the morning?

A Normally they feed and it is court call, to be taking individuals back and forth to court. But now I know that I wasn't going to court. It was impossible for me to go to court, because I didn't have no case in court. The only reason I was there was on the Brad King case.

Q Okay.

A I got up out of bed. I peeped out the door. I didn't see no one. I went back, put my tennies on and my clothes. I put my sweatshirt on and I just looked. I was wondering what was happening, you know, why is my door open? Why ain't nobody else's door open? I know my door ain't supposed to be opened. Special orders say these doors wasn't supposed to be open.

Q Tell us what happened.

A So then I just, you know, I don't know even how to describe it. I guess the face of God, you know, I just was able to get out of there.

Q Tell us how you got out.

A You know—

Q What section?

A I'm going to be truthful with you. I was on Northeast [550] 1 and like from the fear of death, you know—

Q Tell us how you got out of Northeast 1?

A I don't even remember exactly.

Q Did you climb out a window or go through a door?

A I don't even remember. It seems like I just blacked out. I told my other lawyer that, you know, that is why he had sent me to St. Elizabeths, you know, seemed like I was out, just out of it. I thought they was coming to kill me that morning. Hey, I thought they was coming to take my life.

Q Can you tell the ladies and gentlemen of the jury how you left Northeast 1? Did you go out a window?

A I have been thinking about it and trying to figure it out. I admit I left that jail. There is no doubt about it. I swear to God I left there.

Q Would you prefer not to tell the ladies and gentlemen of the jury?

A I want to tell them, but I can't tell them. I don't remember.

Q Did you go out a window?

A I don't remember going out a window. I don't know. All I can say is I just don't remember. I just blacked out that morning.

MR. DRURY: I have no further questions.

CROSS-EXAMINATION

BY MR. ROBBINS:

* * *

[552] Q During the summer of '76, did you ever have an occasion to see Mr. Cooley suffer any beatings at the hands of the guards at the jail?

A Yeah, I seen an incident down by the cell, yes.

Q Would you describe that for the jury?

A Well, like I don't know where he was coming from, you know, but a couple of officers had jumped on him down by his cell, you know.

Q And what happened?

A They threw him in the cell.

Q Did you see them hit him?

[553] A Yes.

Q With what, if anything?

A I couldn't see—see, I'm in a position like I can see, but I can't see everything that is going on, because like

all of the cells in a straight row, but you only have a little crack to see out your door, like you can see the scuffling going on, you can see the figures, but you can't see clearly from my cell, because our cell was in a row, straight in a row, and I couldn't see through the wall.

Q Could you hear anything?

A Yeah, I could hear good.

Q What did you hear?

A I heard scuffling, you know. I heard Tim making some noise, you know.

Q Did you hear any threats?

A Well, there was a lot of noise going on. All of the convicts was hollering, you know, "Leave that man alone," you know, and using a lot of profanity, you know.

Q Do you remember when this was?

A I couldn't say.

Q In relation to August 26th?

A No, I couldn't say.

Q It was during the summer, though?

A Yes.

Q Do you ever remember seeing Mr. Cooley after this occurred in the hours afterwards, the day afterwards?

[554] A I couldn't say, you know. We was on dead lock, you know. When you're on dead lock you don't come out yourself. You stay locked in your cell. They brought the individuals from another unit over to our unit to feed us, you know. That is how we eat. No one came out of the cells on our unit.

Q Are there any other incidents that you observed occurring to Mr. Cooley?

A Not that I can recollect, not that I can bring to mind.

* * *

[561] BY THE DEFENDANT WALKER:

Q All right. Mr. Bailey, how did you get out of the D.C. Detention facility on August the 26th, 1976?

A It was early in the morning. The officer opened my cell, so I peeped out of my cell. I said, "What's my cell doing open?" I'm saying this to myself. So, I put my clothes on and I walked up to the tier to look out the window, looked around to see what was happening, see why

I was out. I looked [562] and seen that there was a cell open. When I looked in the cell the whole window was out. So, I was out. I was just amazed. I looked out the window. I put my whole head out the window and was out. So, I just—I climbed out the window and I left.

Q So, in other words you're saying that you left out of a window—

A Yes.

Q —that that was out in a cell?

A Yes, sir. The cell wasn't too far from mine. I walked up the hall. I looked. It was open. I looked. I said,—I looked, I went in the cell. I looked out. The whole window was gone, the window was out.

Q Okay.

A That is why I left. I climbed out the window.

Q What was the number of the cell that you went out of?

A It was the end cell.

Q How far was your cell, the cell that you resided in, how far was that cell away from the cell that you went out of that you went out of this open window?

A Maybe three cells or four cells. I don't recall right now.

Q And, who if anyone went out of the open window with you?

A Wasn't nobody out when I come out.

[563] Q What do you mean, "Wasn't nobody out when I come out?"

A When I peeped out my cell, I didn't see no one. I backed up in my cell. I put on my clothes.

Q You mean no one else was out of their cells?

A No.

Q So, you left by yourself, is that what you're saying?

A Yes, that is correct.

Q Did you jump out of the window? How did you come out?

A There was some sheets hanging out the window. I just left. I just climbed down, jumped down and got out.

THE DEFENDANT WALKER: I have no further questions for the witness.

THE COURT: All right. Mr. Schaars.

CROSS-EXAMINATION

BY MR. SCHAARS:

Q Mr. Bailey, did you ever surrender yourself to the police in this case?

A I had the police called. I had the jail officials called several times.

Q Did you call them?

A No, I didn't.

Q Did you ever go to a police precinct in the District of Columbia and surrender yourself?

[564] A No, I didn't, sir.

Q Do you know of the existence of the Federal Bureau of Investigation?

A The existence?

Q Did you know that they exist?

A Yes.

Q Did you ever surrender yourself to them?

A No, I had them called.

Q Did you call them?

A No, I didn't.

Q Do you know of the existence of the United States Marshal's Service, people employed by the Marshal's Service that are in this courtroom, the gentlemen right to your right?

A Yes, sir. Yes, sir.

Q Did you, yourself, ever call these individuals—

A No, sir.

Q —to surrender yourself?

A No, sir.

Q Did you ever appear at any courthouse within the District of Columbia or anywhere else to surrender yourself?

A No, sir.

Q Now, you indicated, sir, in response to questions from Mr. Drury that Captain Dickinson and Major Long threatened your life, is that correct?

A A couple other officers also.

[565] Q When was it that Major Long threatened your life?

A I couldn't be exact.

Q Well, sir, if you arrived at the jail in June of 1976 and you left in August of 1976, which is the closer to your time of arrival or time of departure?

A I believe it was after I had an interview with Brad King's lawyer. I don't remember.

Q I'm not asking you that.

A See, I don't know exactly. I don't—

Q Was it closer to the time that you arrived or the time you left the jail?

A I can't say exactly. If I could say I would say.

Q Where were you when this threat was made upon you? Exactly where were you in the jail?

A At that time, um, let me see. I might have been on Northeast 3. I can't say for sure. I wasn't—

Q Was Captain Dickinson there when this happened?

A No, he wasn't.

Q He wasn't there?

A No.

Q You're positive?

A Pretty sure he wasn't.

Q But Major Long was there?

A Yeah, Major Long was there.

Q Now, I'm certainly human and—but, I have some [566] notes here that I took, and it is not my recollection that controls, but I recall you testifying—

MR. DRURY: I object to the self-serving editorializing.

BY MR. SCHAARS:

Q I recall you testifying on direct examination that Major Long and Captain Dickinson were there and threatened to leave you hanging and they were there together and now which will it be, sir?

A I testified that Captain Dickinson and Officer Webb had threatened me.

Q When was that, sir?

A I don't remember exactly when it was.

Q Was it before or after Major Long threatened you?

A I can't be sure.

Q Was it closer to the time that you arrived in the jail than it was to the time that you left?

A Well, sir, after they had threatened my life, you know, like I started watching, just watching things more closely, and I wasn't—

Q I'm sure you did. I didn't as [sic] you that.

A I wasn't paying attention to the time.

* * *

[567] Q Now, sir, you testified about some fighting incidents and you indicated that they occurred on the way or back from your appearances in Superior Court on behalf of somebody else, is that correct?

A Yes, sir, Brad King.

Q Do you know what the date of that was, sir?

[568] A No, I don't.

Q Well, do you know when you went to court in that case?

A No.

Q Do you know whether or not it was the month of August?

A I'm pretty sure—I'm pretty sure it wasn't the month of August.

Q I'm sorry, sir?

A I'm almost sure it wasn't the month of August.

Q It was in the month?

A It wasn't in the month of August.

Q Thank you, sir.

A Yes, sir.

Q Would that make it June or July, sir?

A It is possible, sir. I'm pretty sure it wasn't August.

Q Now, sir, you also testified that there came a time when you got into a scuffle with another inmate and Officer Graves became involved in it?

A Yes, sir.

Q Do you remember when that occurred, sir?

A That was on the way when I was coming back from court.

Q Well, is that the incident that we have just been [569] talking about that you're pretty sure it did not occur in the month of August?

A This incident with Officer Graves?

Q Yes, sir.

A This incident, yeah, I don't think that occurred in August.

Q Sir, do you know how many lawsuits you filed since you have been an inmate?

A Um, I filed one, yes.

* * *

[571] Q Now, sir, this lawsuit that you have referred to and everybody else has referred to that you filed with regard to Mr. Graves, has that come to trial yet?

A No, it hasn't.

Q Have there been any court appearances that you have made in that suit?

A No. The officials at the jail asked for an extension of time.

Q Isn't it correct that it is the District of Columbia Corporation Counsel seeking an additional moment of time, rather than the officials at the jail?

A Well, he's the one that prepares the writ.

Q The lawyer for the jail?

A So that means that the jail is not ready to answer my—

Q Are you a lawyer, sir?

A No, sir.

Q Now, Mr. Bailey, there has been no decision on the merits of your lawsuit—

A No, sir.

Q —on whether or not what you say is true or what you [572] say is not true in that lawsuit against Mr. Graves, no Court has ruled on it?

A No, sir.

Q Now, sir, you indicated that there was a time that nine or twelve correctional officers descended upon you, told you you were going to the hospital and gave you a rough time. When was that?

A That was when they took me up on Southeast 3, put me up on the mental ward, you know. I'm practically the only one up there that is not taking medicine.

Q Was that before or after August 26th?

A That was after.

Q Now, sir, you indicated that there came a time that you complained about a back ailment?

A Yes.

Q You also indicated that a medical technician did come to see you, is that correct?

A Yes.

Q Am I accurate in saying that you also testified that you burned everything that you could in that cellblock in Northeast 1?

A No, not everything that I could. I burned a lot of things that was in my cell. I couldn't come out of my cell, but I burned sheets, blankets, you know.

Q The things you could get a hold of?

[573] A Trash. There's a lot of things I wanted to keep that was personal, so I wouldn't burn them. I wouldn't burn my clothes. I would be naked.

Q Something that was important to you, you wouldn't burn it?

A Right.

Q Anything else you would burn?

A Well, my bedding was important, for if I got sick, couldn't get to the hospital for some other reason, they wouldn't feed us or something, yeah, I would burn something.

* * *

[574] Q Now, sir, could you give an estimate of how many threats you can recall receiving, yourself, while you were in the District of Columbia new jail facility in the month of July?

A No, I sure couldn't.

Q Were they on a daily basis, Mr. Bailey?

A No, they wasn't on a daily basis.

Q Can you recall how many, if any at all, you received during the month of June?

A See, like I didn't have—like only on a few occasions, you know, I had the opportunity to make notations, you know, wherein I was hurt, you know, or something specific happened that I would bring it to the physician's attention, the officials. Like when I had a threat made, you know, there was nothing I could do about a threat. I'd bring it to their attention.

[575] Q Sir, I'm not asking what if anything you did about it, I'm just asking if you recall how many there were.

A No, sir, I couldn't.

Q How about during the month of August, sir?

A No.

Q You don't remember?

A No.

Q Were there more than ten?

A I don't think it was that many.

Q Well, sir, would it be more than five?

A See, you know, like I can't give no specific estimate, you know.

* * *

[583] Q Do you remember receiving any threats on the evening of August 25th?

A No, nothing that I can recall.

* * *

[584] Q You heard Mr. Cooley testify here yesterday, did you not?

A Yes, sir.

Q And you heard him make reference to the fact that the only reason he left was because the two people that were on trial with him threatened him?

A He said, "They."

* * *

[586] Q Did you see him that morning?

A No, sir.

Q And, is it your testimony that you didn't threaten this gentleman in the blue suit here, you didn't coerce or force him into leaving the jail?

THE DEFENDANT WALKER: Objection, Your Honor, he answered that once.

THE COURT: No, that question hasn't been asked. You may ask it.

THE WITNESS: No, I didn't.

BY MR. SCHAARS:

Q You never said a word to Mr. Cooley, is that correct?

A No, sir.

Q You peeked out and you left?

A Yes, sir.

Q Do you remember what month you were captured?

A November.

Q November?

A Yes, sir.

Q Of 1976?

A Yes, sir.

Q And, is it true that you did not surrender yourself?

THE COURT: I think you have been into all that.

THE WITNESS: I had people call the jail several times.

[587] MR. SCHAARS: Nothing else.

REDIRECT EXAMINATION

BY MR. DRURY:

Q Why didn't you surrender yourself?

A I was in fear of my life. I know that if I turned myself in I would still be under the threats of death. Always knew that the FBI wanted to kill me, after I escaped, so I was in limbo. I didn't know what to do. I did have some people call to the officials at the jail on several occasions.

Q Let me ask you a question: You stated that you never surrendered yourself, because you were still fearful of the threats?

A That is right.

Q Did you understand where you would be returned to?

A Yes, sir.

Q Where?

A The new detention center, 1901 D Street, Southeast.

Q What section?

A Northeast 1.

Q Did you know who the guards would be?

A The same officers that was there before I left.

Q Did you ever hear that the FBI was looking for you?

A Yes, I did.

Q Didn't you feel that you could tell the FBI that you didn't want to return to the D.C. Jail in Northeast 1?

[588] A No. The FBI was telling my people that they was going to shoot me.

* * *

[589] BY MR. DRURY:

Q Now, when you're in jail do you have a calendar or a diary or a date book that you keep records on?

A No.

Q Do you—

A Some of us get calendars.

Q Do you have a calendar?

A No, I don't.

Q Do you have any type of a date book in which you write down significant events that occur during your jail time?

A No. No.

Q Do you know—do you have a watch that you have on?

A No, I don't have no watch.

Q As far as you know who keeps the days and the times for you, sir?

A Well, I don't worry about them, you know, like I ain't trying to show—I have been in jail a little while, you know. I don't keep track of time, you know, like that.

Q While you are in jail who keeps your time? Who keeps [590] the events that significantly affect your life? Who keeps a record of those?

A The administrators. The officers, they keep records, you know, if something happens they might keep records of anything that specific, that, you know, have some significance they would keep a record.

Q Are you allowed to see all of your records?

A No, I'm not.

MR. SCHAARS: Objection, Your Honor.

THE COURT: I think we have been into that.

MR. DRURY: I'm sorry.

BY MR. DRURY:

Q Now, what was your intention in filing these lawsuits?

A My intention was to stop the administrators from threatening my life.

Q Do you feel that these lawsuits were justified?

MR. SCHAARS: Objection, Your Honor.

THE WITNESS: Yes.

THE COURT: I think the principal thing is, he has filed them. The lawsuits are admitted in evidence. They speak for themselves. He has asked for \$100,000 damages.

THE WITNESS: I asked for \$150,000.

THE COURT: All right.

BY MR. DRURY:

Q Do you recognize that as a prisoner you have certain [591] rights as a prisoner?

A Yes.

Q Did you feel they were being violated?

MR. SCHAARS: We have gone into this a number of times.

THE COURT: You raised the question about lawsuits.

MR. SCHAARS: He has answered it three times.

MR. DRURY: It is more than just a prisoner's rights involved here, Your Honor.

BY MR. DRURY:

Q Now, special handling. When they put you on special handling did you feel that your rights were being violated?

A Yes, I did.

Q Now, in answer to Mr. Walker-El, you explained that there was a lady in the courtroom this morning.

A Yes. She's been in the courtroom all week.

MR. SCHAARS: Now, you just answer the question, please.

THE COURT: Wait a minute. I don't think that has anything to do with this. It is an open trial. Many people have been in this courtroom.

MR. DRURY: Your Honor—

THE COURT: There may be a hundred people, that is immaterial who has been in this courtroom. There is an official record being kept of this as I pointed out. We are not going [592] into any further testimony of who took what notes.

BY MR. DRURY:

Q Now, tell me about the—from your understanding of your cell. Can you cell be opened individually?

A No, it is impossible.

Q Can a police officer in the bubble push a button and have your cell opened, only?

A Yes.

Q Can a police officer or a correctional officer come to your cell with a key, turn it, and open it?

A No, he cannot.

Q Is the only location of that your cell can be opened at the bubble?

A Yes.

Q Can your cell be opened and the cell right next door remain shut?

A Yes.

Q You stated that you peeked out in the morning of August 26.

A Yes.

Q Was it light out or dawn as you recall?

A It was early in the morning. It was still dark.

Q And you proceeded out of your cell?

A Yes.

Q And what happened? You proceeded down and you saw an [593] open cell?

A I peeked out first. Like I didn't see anyone, you know. So I said, "I wonder what my cell door is doing open"? So, I backed up, put my tennies on and my clothes.

Q Your tennis shoes?

A Yes. I put all my clothes on, walked out of my cell. I walked down—I was walking down the tier. I seen the cell open.

Q Whose cell was it?

A It was Walker's cell.

Q Did you know it was Walker's?

A Yes.

THE DEFENDANT WALKER: Objection, Your Honor. That is a violation of my Fifth Amendment Constitutional Rights.

THE COURT: Overruled.

BY MR. DRURY:

Q Did you look in the cell?

A Yes.

Q Did you see him?

A No.

Q Did you see anything else in the cell?

A I seen mattresses and a table.

Q Did you see a window?

A Yes, I seen a window.

Q Was it open?

[594] A Yes, it was.

Q Did you feel you could climb through it?

A Yes. I looked out of it and I just left.

Q What did you see out the window?

A The wall, seen a wall.

Q You mentioned something about a sheet?

A Yes.

Q Now, how high up were you?

A On the second floor, I believe.

Q How far down to the ground, if you could approximate, look up that wall—

A About right up to there.

Q To the third horizontal line?

A Yes.

Q Sixteen, seventeen feet, Your Honor?

THE COURT: Something like that.

BY MR. DRURY:

Q What did you realize when you looked out and you saw no one and you saw an open window and you saw a sheet?

A I couldn't believe it. You know, I just couldn't believe it.

Q You saw freedom, didn't you?

A That is what I saw. I left.

Q Why?

A I was in fear of my life. When I seen the opportunity [595] was right there for me to go, I looked out that window and I seen it, I didn't see nobody, I didn't

see no officers, I ain't seen nobody out the window, just the wall, I got out of that window so fast and I got over that wall and started running so hard and fast I must have lost ten pounds getting away.

Q Even though it was dark out you saw a little bit of sunshine, didn't you?

MR. SCHAARS: Objection, Your Honor.

THE WITNESS: Yes, sir.

MR. DRURY: No further questions, Your Honor.

* * *

[588] MICHAEL THOMAS DOZIER-BEY

was called as a witness by and on behalf of the Defendant Walker and after having been duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY THE DEFENDANT WALKER:

[599] Q All right. Will you please state your full name and where you presently reside to the Court, please?

A Full name is Michael Thomas Dozier-Bey. I'm presently living at Lorton Reformatory.

Q How long have you been residing there?

A Approximately six and a half months now.

Q Have you ever resided—or, let me say have you ever been incarcerated in the D.C. Detention facility located at 1901 D Street, Southeast?

A Yes, sir, I have.

Q When were you first committed to the Detention facility?

A Well, I can't recall the exact day, but my first incarceration was admitted at the old jail, where they have—

Q Let me ask you this: Were you housed at the D.C. Detention facility between July 11th, 1976, and August 26th, 1976?

A Yes, I believe I was.

Q All right. And, exactly within the D.C. Detention facility, what particular block were you housed in within that particular period?

A Northeast 1.

Q Northeast 1?

A Right.

Q Are you familiar with the cell house called Northeast 1?

A Yes, I am.

* * *

[601] BY THE DEFENDANT WALKER:

Q Did you have any fear about coming into the Northeast 1 housing unit to work?

A No.

Q Had you ever been threatened in the Northeast 1 housing unit when you came over to work as far as someone doing any type of physical or bodily harm to you?

A No, I have not.

Q Now, I'd like to ask you this question: Have you ever, during—strike that, please.

During the time that you came into Northeast 1 to work on this detail, cleaning unit, what was the condition of [602] the block in your opinion?

A Well, the cell block was in—the whole cell block was in a state of disorder. There was plenty of times when I came in there had been floods or scraps all over the floor or after somebody burned the mattress or burned the trash. I wasn't allowed to clean up. The officer said I wasn't allowed to clean up. They left it the way it was. So my job was to come there and just feed. It was really in a disorderly position at the time.

Q So, in other words you're saying even though you were on the detail crew—

MR. SCHAARS: Objection.

THE COURT: He has testified. You needn't repeat his testimony.

THE DEFENDANT WALKER: All right.

BY THE DEFENDANT WALKER:

Q You testified that you were on the detail crew or the people that came over from Northwest 1 to Northeast 1 to do the cleaning?

A Yes.

MR. SCHAARS: Objection. That is not his testimony. He came over to feed, not to clean.

THE COURT: Yes, I think that is correct.

BY THE DEFENDANT WALKER:

Q All right. You came over to feed?

[603] A Yes.

Q But you weren't allowed to clean?

A Not at the possible time when I started coming over to feed, they wouldn't allow us to clean up.

Q Who was allowed to clean the Northeast 1 cell block during that period?

A No one.

Q And you said that you came over daily?

A Every evening.

Q And, the refuge or—was the refuge and the burnt materials and the trash and things that you saw all over the place every evening that you came over it was still there?

A Every evening.

Q So it was never cleaned up?

A Not to my knowledge.

Q Now, during the period you came into the Northwest—the Northeast 1 housing unit as a detail man, did you have occasion to talk to me?

A Yes.

Q And how often did you talk to me on these occasions?

A As often as possible when I came over.

Q Now, have you ever, during the period that you came over, had you ever saw me, with your own eyes, have any type of seizures or blackouts?

A Only once.

[604] Q All right. Would you explain that seizure or the blackout to the Court, the way that you saw it?

A Yes, sir. First of all, I'm not a doctor, but the way I seen it, like I was sitting in your cell one day and at first from there, you fell to the floor by your bed. I left immediately from in front of your cell to walk down to the box where the officer was, saying that I had a man sick up there. I didn't know what was wrong with him. He called all the detail men to the front and dismissed me from the block. From there on then I don't know what happened.

* * *

[622]

THOMAS W. ROBINSON

was called as a witness by and on behalf of the Defendant Walker and after having been duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY THE DEFENDANT WALKER:

Q Would you please state for the Court your full name and where you presently reside?

A Thomas W. Robinson. I reside at the District of Columbia Detention facility, formally known as the D.C. Jail.

Q Uh-huh. How long have you resided there?

A I have been there now for about ten days.

Q Where were you subsequent to coming to the District of Columbia Detention facility? Where did you reside?

A The Medical Center for Federal Prisoners, Springfield, Missouri.

Q Springfield, Missouri?

A Yes, sir.

Q Have you ever had occasion before this time now to be housed in the District of Columbia Detention facility?

A Yes, I have.

Q And to make my question shorter, were you housed there between June the 1st and August the 26th of 1976?

A Yes, I was.

Q All right. Exactly where in the District of Columbia [623] Detention facility, what particular cell block were you housed in?

A I was on Northeast 2.

Q Is Northeast 2 some type of special block or anything?

A Yes, it is for the purpose that for the prisoners who work in the D.C. Jail.

Q For people who work in the D.C. Jail?

A Yes.

Q When you say, "Work," do you mean inmates or officials?

A Inmates that do—are doing labor in the jail, such as cooks, laundry, sweep up, clean up.

Q So, in other words in order to be in that block you would have to be on a privileged type detail?

A Yes, sir.

Q What detail were you on?

A I was with the culinary unit.

Q Now, do you know or are you familiar with an individual by the name of Ralph Walker-EI?

A Yes, I am

Q Would you indicate by pointing to him, please.

A The gentleman sitting right there.

Q All right. Now, Mr. Robinson, when did you first become familiar with me?

A In D.C. Jail, in the kitchen, in the culinary unit.

[624] He was working with me.

Q He used to work in the culinary unit with you?

A Yes, he did.

Q What month was this?

A It was between June and August.

Q Between June and August. All right. What was your function in the culinary unit, Mr. Robinson?

A I was the lead man in the tray room.

Q What was my function?

A You was a helper in the tray room.

[625] BY THE DEFENDANT WALKER:

Q All right. Mr. Robinson, do you have personal knowledge of why I was moved out of Northeast 2?

A Yes, I do.

Q Why was I moved?

A To my knowledge—I mean when I first really became attached to you, working down at the kitchen, the job was to fill coffee pots up and things. One morning, while you was filling up a coffee pot, you had some kind of a seizure or fit and I grabbed you to stop you from getting scalded. A subsequent time you were working down there you had a couple more seizures, about three or four, I don't know how many, and people said that they didn't want you working down there because you might get hurt and cause some conflict.

Q Now, to your knowledge, Mr. Robinson, since I was housed in the same housing unit with you, was I ever able to receive any type of medication or attention for these seizures?

A Not to my knowledge.

* * *

[630]

CROSS-EXAMINATION

BY MR. ROBBINS:

Q Mr. Robinson, I am Bob Robbins, and I represent Mr. Cooley in this case.

During July and August of 1976 did you ever have an occasion to go down or go to Northeast 1?

A Yes, I did.

Q And for what purpose would you go down there?

A To take food.

Q Did you ever see Mr. Cooley when you were there?

A On occasions.

Q Did you ever see any physical injuries on his person?

A I seen a knot on the side of his face.

Q And, about when was this, if you can recall?

A I can't recall the exact date, because at the time I seen two officers dragging Mr. Cooley on the escalators, you know, and I heard him hollering. I said, "Who's that down there?" The officer said, "Come on." Mr. Cooley said, [631] "Stop hitting on me." When the officer brought him around the corner he hit him up side the head.

Q What did he hit him with?

A The slapjack or slapsticks that they all carry on the sides of their pockets.

Q Do you know where Mr. Cooley was coming from, from your own personal knowledge?

A I don't know where he was coming from.

Q About how long did this incident take place?

A I'd say about as long as it took for you to get up the escalator to another floor, about a minute and a half, something like that coming through the hall.

Q Was there any blood that you saw?

A I didn't see any.

Q And for how many days after that did Mr. Cooley have a knot on his head?

A I didn't see him every day.

Q How many officers were involved in this incident?

A Two that I seen.

MR. ROBBINS: I have nothing further.

* * *

[643] RECROSS-EXAMINATION

BY MR. DRURY:

Q You said a slapstick. Could you define slapstick for the jury?

A Yes, sir. It is a piece of metal, looks like a leather belt about that long.

Q Now, you have your hands approximately a foot apart.

A About this long. You can see the top of it with a piece of strap sticking out of the back pocket of the officers.

Q What do they use it for, to pacify the prisoners?

A They use it to hit the prisoners with.

Q Keep them in line, right?

[644] A Yes.

MR. DRURY: Thank you, no further questions.

* * *

[645] VINCENT WALKER

was called as a witness by and on behalf of the Defendant Ralph Walker and having been duly affirmed was examined and testified as follows:

* * *

[649] DIRECT EXAMINATION

BY THE DEFENDANT WALKER:

Q Sir, would you please state your full name and where you presently reside to the Court, please?

A I am Vincent Walker, presently residing at Lorton Reformatory.

Q How long have you resided there?

A Approximately four years.

Q Uh-huh. Now, are you familiar with an individual by the name of Ralph Walker-El?

A Yes, sir, I am.

Q Uh-huh. And is he in the courtroom now?

A Yes, sir, he is.

Q Would you indicate by pointing to him?

A Right there.

Q What is your relationship to me?

A I'm his brother.

Q Uh-huh. Same father, same mother, that type of brother?

A Right.

Q And, how long have you personally known or been in direct contact with myself?

A Well, I'd say approximately all my life except off [650] and on, maybe like we may have been away from each other like occasions like this here.

Q All right. Now, explain what this deals with so we can be just a brief as we possibly can, I want any testimony that you may have concerning any type of seizures that you have noted through the years that I have had while we have lived together under the same roof or—let me rephrase that.

Have you noted any seizures or blackouts that I have had during the years that you have known me?

A Yes, I have.

Q How frequently have you seen me go through spasmodic changes as far as these seizures were concerned?

A I can't really approximate, how many times that you have been through a situation of this nature, but I can say it has been a whole lot of times that I witnessed these type of attacks take place.

Q Have you ever seen me actually fall out as a result of one of these attacks?

A Once.

Q Now, when did you—where was I when you noted these attacks?

A Most of the time, like it was in bed, you know, like you had been asleep, like I had been asleep. I might wake up in the course of the attacks that you have, you know, you might be jumping in the bed, biting yourself, things of this [651] nature, blood and stuff be on the sheet, you know.

Q All right. To your knowledge does anyone else in our family suffer from epilepsy?

A No, they don't.

Q All right. To your knowledge was I ever taken to the hospital as a result of these epileptic seizures through the years?

A No, you haven't. You know, I don't think—I think you should have been taken to the hospital quite a few times but by being such a large family, a lot of times we didn't have any money to eat, let alone go to the hospital, you know.

THE DEFENDANT WALKER: That will be all the questions for this witness for the time being.

* * *

[662] THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v.

CLIFFORD BAILEY, DEFENDANT,

RONALD COOLEY, DEFENDANT,

RALPH WALKER, DEFENDANT.

Cr. No. 76-735-4

Washington, D.C.

March 14, 1977

The above-entitled matter came on for further trial in open court at 10:00 o'clock a.m. before:

THE HONORABLE OLIVER GASCH

United States District Judge, and a Jury.

* * *

[667] THE COURT: All right. Now, the problem the Court has with the defense of duress and coercion in this case is that there is no showing by you or by any other defendant that you turned yourselves in after you made your escape. That is an essential ingredient. For that reason, I don't think I'm going to instruct upon duress or coercion. I don't think it belongs in the case. Bring in the jury.

* * *

[668] DR. ARIS KARAS

was called as a witness by and on behalf of the Defendant Walker and after having been duly sworn was examined and testified as follows:

* * *

[670] THE COURT: Would you give us your name, Doctor?

THE WITNESS: Aris Karas.

THE COURT: What is your first name?

THE WITNESS: A-r-i-s, Aris Karas.

THE DEFENDANT WALKER: Right.

THE COURT: And, you are a member of the medical profession, a doctor of medicine?

THE WITNESS: Right.

THE COURT: And your specialty?

THE WITNESS: Psychiatry.

THE COURT: And your present assignment is what?

THE WITNESS: Psychiatrist, staff psychiatrist at the United States Penitentiary, Leavenworth.

THE COURT: Leavenworth, Kansas?

THE WITNESS: Right.

* * *

[678] THE WITNESS: The defendant, Mr. Walker, was seen for seizures he claims that they come when asleep. The last time was last Tuesday night. He was told by the cellmates that he is seen shaking and trembling. They put a spoon in his mouth.

A DEPUTY MARSHAL: I don't think some of the jury can understand.

THE WITNESS: Here, I will give it to you.

THE COURT: No, you read it, Doctor. Just start over again. Did some of you not get it?

THE DEFENDANT WALKER: Is all of the jury able to understand, clearly, what he says?

THE COURT: Read it again, would you start over again?

THE WITNESS: The defendant, Mr. Walker, was seen for seizures. He claims that they come when asleep. The last time was last Tuesday night. He was told by the cellmates that he is caught shaking and trembling. They put a spoon in his mouth. He bit on the inside of his mouth. No incontinence, no seizures during the day, well oriented, memory okay, his mother has seizures. If I may, Your Honor, with your permission state something to explain this just towards—

THE COURT: All right.

THE WITNESS: This information I obtained from Mr. Walker.

[679] THE COURT: I understand.

THE WITNESS: He is on Dilantin, 100 milligrams, three times a day. I increased the Dilantin to 100 milligrams, four times a day and put him on Mysoline, 250 milligrams daily.

THE DEFENDANT WALKER: All right.

BY THE DEFENDANT WALKER:

Q Now, from what you have read you have said that I have come to—that I came to you and complained of epilepsy, or that other inmates had seen me shaking in the bed and as a result of what I told you I was put on Dilantin and Mysoline. Now, was I put on Dilantin and Mysoline at the same time or was I put on them at different dates?

A I did not put Mr. Walker on Dilantin, myself. He'd been on Dilantin before, by the out-patient department. He was only referred to me for just, you know, that he had had a seizure, epileptic seizure. They always—most of the—not always, but most of the time they refer a guy who has seizures to me.

THE COURT: All right.

THE WITNESS: To see if he needs further investigation or continuation of treatment.

THE COURT: Now, he asked you the question about Mysoline as well as Dilantin. Did you prescribe Mysoline?

THE WITNESS: I did prescribe the Mysoline. He was [680] on Dilantin by the out-patient department at that time. He was taking Dilantin three times a day and I increased the Dilantin to four times a day as a precautionary measure.

* * *

A I want to make, with Your Honor's permission, one point clear if Your Honor would allow me to?

[681] I did not make a diagnosis of seizure disorder.

THE COURT: All right.

THE WITNESS: Because nobody witnessed it from the staff or from the employees, a seizure.

THE COURT: I see. All right.

THE WITNESS: It was only diagnosed convulsive disorder by history.

* * *

[682] BY THE DEFENDANT WALKER:

Q How many times a day, according to those records, Doctor, was I receiving the Mysoline?

A I put you on one Mysoline daily, 250 milligrams.

Q All right. And do you have a record there about—do you have a record there where I actually received the medication?

A Yes, I think I do.

Q All right. Would you take a look at that record, Doctor, and tell me what that record reflects as far as how many times a day I was actually receiving it?

A Yes, sir. Well, apparently—well, the record I have here of what Mr. Walker was receiving—forgive me for [683] doing that, Your Honor. I have the record. From what the pharmacist was giving to Mr. Walker every week, he was giving him an envelope of Dilantin 28/4. That means four Dilantin a day, 28 tablets a week. I have a record that he gave him 14. Apparently that means that 14 Mysoline for two weeks. Which means that one a day, and yes, that was continued until, of course, until May 1976.

* * *

[688] CROSS-EXAMINATION

BY MR. SCHAARS:

Q Doctor, you just made reference to a medical history. Could you tell the ladies and gentlemen of the jury what the basis is for that medical history, who provides it, if you know?

A The patient.

Q The patient does?

A Yes.

Q You just indicated that there is a portion of that history that asks a question with regard to epileptic seizures [689] on that form.

A Yes.

Q And what is the question that is there, sir?

A This is a form, Form 101-11.A, of the Bureau of Prisons, report of medical history, and there is one question, "Epilepsy or fits." And, it was marked—

THE COURT: What was that question?

THE WITNESS: "Epilepsy or fits."

THE DEFENDANT WALKER: What did he say?

MR. SCHAARS: I believe it is: "Epilepsy or fits."

THE COURT: Epilepsy or fits?

THE WITNESS: Yes.

BY MR. SCHAARS:

Q What is the answer to that question, Doctor?

A No.

Q That is provided by the patient or by the inmate?

A Right, the inmate.

Q What is the date of that history, sir?

A Well, that is August 11, 1973.

Q Now, sir, have you had a time—have you had time since being notified of the requirement that you appear here to review that medical file?

A As a matter of fact, we talked about this with Dr. Jarvis, who is my boss.

Q I'm sorry.

[690] A I discussed this with Dr. Jarvis, who is the chief medical officer at the penitentiary.

Q Now, sir, did you have a chance during the course of your review of that file—

A Right.

Q —to note whether or not there ever was made a medical diagnosis of epilepsy for Mr. Walker?

A There is not medical diagnosis of epilepsy.

Q Now, sir, did you have a chance to, in reviewing that file, to determine whether or not seizure activity on the part of Mr. Walker was mentioned in that file?

A There was mentioned only by history, information obtained from him.

Q When?

A But no seizure witnessed by a staff member, P.A., or—that is a physician assistant, or—

Q Would that include a correctional officer, sir?

A Yes.

* * *

[693] BY MR. SCHAARS:

Q Now, Doctor, in response to some of Mr. Walker's questions you talked about the prescription or the prescribing of medication for Mr. Walker as a result of your contact with him. Why was medication prescribed for him, medication for seizures prescribed?

A Because it is better to prescribe in case of doubt about seizures than not to prescribe.

Q Is what you're saying that it is a precautionary measure, sir?

A Of course.

MR. SCHAARS: No further questions, Your Honor.

THE COURT: Any further questions, Mr. Walker?

THE DEFENDANT WALKER: Yes, I'm going to ask some questions.

REDIRECT EXAMINATION

BY THE DEFENDANT WALKER:

Q Doctor, you said that in cases of where—you said that in cases where there is the possibility of a person having seizures it is better to prescribe it for him than not to prescribe it for him, is that what you said?

A That is right.

Q So, in other words that is why the medication, the Mysoline was prescribed for me?

A Well, actually the main medication was Dilantin. You [694] just took Mysoline once a day. It is the minimum dose, which you can take, just one tablet a day.

Q What? 250 milligrams?

A Right.

* * *

[709] RALPH WALKER-EL

was called as a witness by and on his own behalf and after [710] having been duly sworn was examined and testified as follows:

THE DEFENDANT WALKER: Actually, there has been a lot of testimony given in this case, and I want to

try to conclude as briefly as I possibly can by telling the ladies and gentlemen of the jury this:

That as far as the complaints, the complaints that were made in the jail concerning the adverse conditions that existed in the jail from the time of the fall, between July the 11th and August 26, the time that I was actually on the dead lock unit there, that we not only complained orally, collectively as a group in Northeast 1 about the conditions that existed there, but we also complained about complaints in petition form.

Mr. Robinson testified the other day that he had received at least one complaint. In fact, there were numerous complaints, but these complaints were futile and we weren't able to get redress concerning these complaints.

Now, there is one more issue that I want to briefly touch on here and that is the fact that after I was released from the detention facility I did in fact contact the proper authorities. I contacted the FBI on a number of occasions. As a matter of fact I kept a constant rapport with the FBI. I had people who had told me that they had brought this information to my sisters that the FBI said that if they ran down on me they was going to kill me. So, in actuality I was never [711] out of immediate danger. I was never out of immediate threat of losing my life. If I would have given myself up I had this FBI threat to contend with and I also had to go back over to the same jail that I had just left from, and this was the reason that I consequently never turned myself into the authorities. That is my testimony.

THE COURT: Do you have any questions?

MR. DRURY: No.

* * *

CROSS-EXAMINATION

BY MR. SCHAARS:

[712] Q Mr. Walker, do you know the names of the individuals in the FBI that you retained this constant rapport with during the course of your escape?

A One of them was an Officer Troy or Fauntroy, or something of that nature. I don't know if that is his exact name or not.

Q When did you call him, sir?

A I called him the second day after I was out, and after that I had occasion to call him on several different occasions.

Q Did you identify yourself at those times?

A Yes, I identified myself.

Q Did you indicate where you were?

A No, I didn't indicate where I was.

Q Did you tell him that you were going to surrender yourself?

A I told him that I would surrender myself if I wasn't being subjected to the same conditions and put on the same penitentiary that I had just left from.

Q How many days did you call this gentleman?

A I don't know. I called him two or three different times during the period that I was in the streets.

Q You were out until December 13th, is that correct?

A I think that is the date.

* * *

[715] Q Now, sir, where did you make the phone call from to the FBI?

A I made the first one from a public phone booth.

Q How did you know what number to call, sir? Did you look it up in the directory?

A I looked it up in the directory.

Q Did you ask for anybody in particular at the FBI?

A No, I just asked to speak to someone on the warrant squad or someone who was connected with escapees.

Q Would the name Fluharty, does that ring a bell? Would that name Fluharty ring a bell with you as the name of a gentleman you may have spoken to, if you spoke to someone?

A Sounds halfway familiar.

Q Exactly what did you tell him, sir?

A I explained to him that I was one of the four gentlemen that had escaped from the detention facility on August 26th, because of the conditions that existed there.

I explained to him how terminal the conditions were there and asked him was it any kind of way that I could get with him to make some type of arrangements as far as turning myself in, if I wouldn't have to go back to the detention facility at 1901 D Street, Southeast and also asked him had [716] there been anything issued concerning, or had he told a man named Earl Berman, whether or not the FBI—or, did he have knowledge that anybody at the FBI had told Mr. Earl Berman that he had intended to kill me if I was arrested.

Q Who is Earl Berman, sir?

A Earl Berman is a personal friend of mine.

Q Are you saying that Mr. Berman told you that the FBI was going to kill you?

A Yes, he did. He didn't tell me, but he told my sister and my sister related this information to me.

Q So, you heard it third-hand?

A Yes, I heard it second-hand.

* * *

[717] BY MR. SCHAARS:

* * *

Q Now, sir, when exactly was the first time that you called [718] Agent Fluharty or someone by the name of Fauntroy with the FBI?

A The second day I was out.

Q Would that be on the 28th, sir?

A That would be on the 28th.

Q Do you recall about what time of day it was, sir?

A I don't know. It was in the early morning hours. I would say have to be between 4:00 and 6:00.

Q A.M., sir?

A A.M.

Q And, do you know long your conversation lasted at that point?

A It had—no longer than a three-minute duration at the most.

Q And you did identify yourself?

A I did identify myself.

Q When was the second time that you spoke to somebody from the FBI?

A Approximately a week and a half later.

Q Would it be fair to say that that would be about ten days later, sir?

A I think that would be fair.

Q To whom did you speak at that time?

A To the same person.

Q Did you ask for him at that time, sir or—

A Yes, I did. I had called the FBI building previous [719] to that, told them that I was going to call.

Q Do you recall what time of day you called at that time, sir?

A It was about 2:00 in the afternoon.

Q How long did your conversation take at that time?

A No more than a three-minute duration then.

Q Did you identify yourself, sir?

A Yes, I identified myself.

Q At that time did you indicate to Agent Fluharty that you were going to turn yourself in?

A I indicated to him if he could work out the conditions for which I wanted to turn myself in, I would turn myself in.

Q What were the conditions?

A Those conditions would be the fact that I wouldn't be harmed by any agent of the FBI, I wouldn't be taken back to the detention facility, 1901 D Street, Southeast.

Q Did there come a time that you spoke to somebody from the FBI again?

A Yes, there did.

Q When was that, sir?

A I would say that would have been about a month later.

Q Would that be mid-October, sir, or late October or mid-November? I'm sorry, I don't mean to confuse you.

A It was in—it was in October. I don't know whether it was late or—it was around—it was in October, around, [720] between the middle and first part of October.

Q Now, whom did you speak to at that time, sir?

A The same guy.

Q Agent Fluharty?

A I assume that is his name.

Q It was somebody on the warrant or escape squad that you were speaking to each time, sir?

A I assume that he was.

Q Did you ask specifically for somebody on that squad the first time you called?

A The first time I called I did.

Q And the second time, did you ask for the same agent by name?

A Yes, I did.

Q And the third time, did you ask for the same agent by name?

A Yes.

Q Now, sir, on that third occasion did you offer to come down and turn yourself in?

A Under certain specified conditions.

Q The same conditions as you have indicated on the two prior occasions?

A The very same conditions.

Q Now, sir, did there come a time when you called the FBI again?

[721] A To my recollection, no.

Q So, from the beginning to the middle of October, whenever that third phone call occurred, to December 13th, you had no contact with the FBI?

A To my recollection, no.

Q Did you call any other law enforcement agency during that period of time, sir?

A No, I didn't.

Q Did you ever appear in any court of the District of Columbia to turn yourself in during that period of time?

A No, I didn't.

Q Did you ever talk to a minister or a priest or any kind of religious leader in an effort to turn yourself in during that period of time?

A Yes, I did. I'm a minister myself.

Q You are, sir? Did you speak to another member of your faith, a minister?

A Yes, I did.

Q To whom did you speak, sir?

A I don't want to give his name at this time. I don't want to incriminate him as far as anything, as far as my escape and everything is concerned. You'd have him up here for a charge.

Q Did you tell that gentleman that you were going to turn yourself in?

[722] A I told him—I had discussed turning myself in with a member of the FBI and I thought very seriously about it, if the conditions that I had specified to you could be worked out.

Q When you spoke to this gentleman from the FBI, did he ever indicate that he would agree to those conditions?

A No, he didn't.

Q Did he indicate that he would agree with anything?

A He indicated that he would agree that I wouldn't be harmed by any members of the Federal Bureau of Investigation, but that he couldn't agree that I wouldn't be taken back to the detention facility, 1901 D Street.

Q So, he did promise you that the FBI wasn't going to hurt you?

A Yes, he told me that the FBI wouldn't hurt me.

Q Did you have any contact with a warrant squad officer of the District of Columbia Department of Corrections during your period of elopment?

A Not to my recollection, unless he is part of that warrant squad.

MR. SCHAARS: I have no further questions, Your Honor.

[724] MR. SCHAARS: In any event, Your Honor, the testimony would be essentially a denial of the allegations that have been made with respect to his conduct as well as a brief description of some of the regimen which he has established at the new detention facility with regard to issuance of slapsticks and other paraphernalia by correctional officers.

The second individual, Captain Dickinson, the various charges have been made and he would basically deny the allegations that have been made as I would put them to him, one at a time.

The third rebuttal witness would be Agent Fluharty of the FBI, a gentleman whose name just came up during the course of Mr. Walker's testimony this afternoon. I have not spoken to Agent Fluharty. I know he is on the squad which does investigate escapes within the District of Columbia, and would seek leave of court to talk to Agent Fluharty before he takes the stand. That is the nature of the rebuttal, but in view of the Court's statement this morning with regard to instructions, and that is an instruction on duress will not be given, I am wondering whether Major Long and Captain Dickinson's testimony are really pertinent at this point. It depends upon the extent and scope of argument.

[725] THE COURT: Well, the Court reached that conclusion after having written a fairly extensive instruction on the subject of duress and coercion and having studied the cases over the weekend. The Court concluded that in order to avail one's self of the defense, one must notify the authorities of his whereabouts or turn himself in, that one is not exonerated by affecting an escape regardless of the conditions, unless one takes that action. That is the ruling of the Court. It is for that reason that I made the observation that I made earlier.

* * * *

[728] WILLIAM FLUHARTY

was called as a rebuttal witness by and on behalf of the Government and after having been duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SCHAARS:

Q Sir, would you please state and spell your name?

A Yes, my name is William Fluharty, III, F-l-u-h-a-r-t-y.

Q Where are you employed, Mr. Fluharty?

A A special agent with the Federal Bureau of Investigation, assigned to the Washington Field Office.

* * *

[730] Q Now, sir, were you ever, during the course of August and September, August to the end of September of 1976 assigned the case styled: Ralph Walker?

A I was not particularly assigned to that case. It was assigned to my partner, Agent Joel Dean, but I did work with him on the case off and on, along with other cases.

Q Did you ever have any contact with an individual whose name is Ralph Walker?

A Just on one particular day when my partner and I and several other agents placed him under arrest.

Q Sir, I'm going to ask you some specific questions with regard to telephone calls.

Do you recall whether or not you received a telephone call from someone whom identified themselves as Ralph Walker on or about the 28th of August of 1976?

A I did not receive a phone call from Ralph Walker.

Q How are you certain of that, sir?

A For one thing, I would have remembered. It would have been an escape case. I would—the name I would know, and the escape thing, I think was what date?

[731] THE DEFENDANT WALKER: Your Honor, I ask the witness to confine himself to the question, please.

THE WITNESS: I was on vacation at the time of the escape. If I could have a specific date, I may have been in Rehoboth.

THE COURT: The date of the escape was the 26th of August.

THE WITNESS: On the 26th I was in Rehoboth Beach, Delaware.

BY MR. SCHAARS:

Q I'm going to ask you a question with regard to the period, ten days after the 28th of August, 1976.

Do you recall whether or not you received a phone call at about 2:00 in the afternoon on that date from a gentleman known as Ralph Walker?

A I did not receive a phone call.

* * *

[732] Q Now, sir, you have talked about telephone messages and referrals. At any time during the time period I have just spoken of that would be the 28th of August through the end of October of 1976, do you recall whether or not you received any telephone message form, the yellow form that you referred to, indicating that a Mr. Ralph Walker had called you?

A I did not get any messages concerning a Ralph Walker.

Q Now, sir, if a Mr. Ralph Walker called you during that period of time, what would you have done with the message?

A I would have immediately notified my partner, Mr. Joel Dean, who's in charge of the case.

* * *

[733]

JOEL DEAN

was called as a rebuttal witness by and on behalf of the Government and after having been duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SCHAARS:

Q Sir, speaking in a loud and clear voice, would you please give your name and spell your last name?

[734] A My name is Joel Dean. The last name is spelled D-e-a-n.

Q Where are you employed, Mr. Dean?

A I am employed with the Federal Bureau of Investigation, Washington Field Office.

Q How long have you been with the Washington Field Office, sir?

A Approximately six and one-half years.

Q How long have you been with the Federal Bureau of Investigation, sir?

A Correction, six and one-half years with the Federal Bureau of Investigation, approximately five and a half years here in Washington.

Q Now, sir, directing your attention to August of 1976. Do you recall what your duty assignment was or your squad assignment was during that time?

A At that time I was working bank robbery investigation, escape, federal prison investigations.

Q Did there come a time during the month of August, 1976, that you received an assignment to investigate an alleged escape of a gentleman by the name of Ralph Walker?

A Yes, I did.

Q Were you the agent assigned the case?

A I was assigned the case of Ralph Walker upon his escape.

[735] Q Now, sir, during the course of being assigned to an escape case or any case with the FBI, if contact is made with a witness or with the defendant, or there is an investigative lead obtained by the Federal Bureau of Investigation during a case, what if any knowledge would you, as the case agent, have of that?

A All leads in regard to Ralph Walker, regardless of what state, even if it were out of the country, would be funnelled through me as being the case agent.

Q Now, sir, during the period of your assignment as the case agent in that case, did you ever receive any messages from anyone within the FBI or any other law enforcement organization that a gentleman identifying himself as Ralph Walker had contacted the FBI?

A I did not.

Q Sir, did you retain your assignment in that case through the actual apprehension of Mr. Walker?

A That is true. I still have it.

Q Sir, if I said that on August 28th of 1976 Mr. Walker called the FBI and spoke to somebody there indicating he would turn himself in under certain conditions, would you have known of that, if that happened?

A I would have.

Q And did you ever learn of that, sir?

A I did not.

[736] Q I ask you the same question with regard to a time period some ten days later. Were you ever advised that somebody called the FBI under that sort of situation?

A I was not advised.

Q Now, sir, I ask you the same question with regard to the first and 15th of October of 1976. Did anything like that happen?

A Not to my recollection.

Q Was anything brought to your attention, sir?

A No, sir, it was not.

Q Now, sir, if one calls the FBI in the early morning hours, let's say 4:00 to 6:00 a.m. in the morning, and asks specifically for an agent, how if at all, is that agent contacted?

A First of all let me clarify this point. If they called the FBI, possibly they might get the headquarters, they determine whether or not it is a violation type case. They would transfer over to the Washington Field Office. We have night supervisors on duty. The night supervisors would take the necessary message, make a record of it, notify the case agent at home, depending upon the nature of the message coming in.

Q Did you ever receive such notification with regard to a phone call from a Ralph Walker in this case?

A I did not.

* * *

[738] MAJOR WILLIAM LONG

was called as a rebuttal witness by and on behalf of the Government and after having been duly sworn was examined and testified as follows:

DIRECT EXAMINATION

[739] BY MR. SCHAARS:

Q Sir, would you please state your name?

A My name is Major William Long.

Q Where are you employed, sir?

A With the District of Columbia detention facility.

Q Where is that located, sir?

A 1901 D Street.

Q How long have you been with the District of Columbia Department of Corrections, sir, if that is where you are employed?

A I am in my 13th year, 12 years 5 months.

Q Now, sir, will you describe briefly the nature of your assignment and your responsibilities at that facility?

A Presently I am the rank and uniform correctional supervisor. My responsibility is managing the three correctional shifts at the detention facility.

* * * *

[741] Q Now, sir, I will begin again about six weeks prior to August 26, 1976, did you in the company of those two gentlemen come upon Mr. Clifford Bailey and indicate to him that if he testified in a specific criminal case in the Superior Court of the District of Columbia that you would see that he was killed or was left hanging in a cell?

A No, sir.

Q Did you, by yourself, on or about that time communicate a threat to somebody by the name of Clifford Bailey?

A No, sir.

Q Now, sir, in your experience in the institution have there been times when you have come into contact from your recollection with a gentleman by the name of Clifford Bailey?

[742] A Yes, sir.

Q Have you ever, in your contact with Clifford Bailey, threatened him?

A No, sir.

Q Sir, does the name Brad King mean anything to you?

A I have heard it referred to recently. It doesn't really ring a bell with me.

Q When you mean recently, do you mean within the last week?

A Yes, sir.

Q In August of 1976 and in July of 1976 and in June of 1976, did that name mean anything to you, sir?

A No, sir.

Q Do you know now anything about a case involving Brad King?

A No, sir.

Q Did you ever communicate threats, either to Mr. Bailey or Mr. Walker or Mr. Cooley concerning possible testimony in a Brad King case?

A Not in the Brad King case or any case.

Q Now, sir, is it part of your job at the District of Columbia Department of Corrections to investigate complaints as they are referred to you by Mr. Robinson?

A Yes, sir.

Q During the course of an investigation—let me give [743] you a hypothetical, sir, if I may. If an inmate complained of brutality on the part of a correctional officer and word of that complaint were referred to you for investigation, what would you do?

A I would investigate the matter, sir.

Q What does investigation entail, sir?

A I would conduct an inquiry by either delegating a shift captain, who is responsible for the day to day operation, possibly more than one member of a committee, and we would interview the inmate and officers who had any contact with the inmate or had any knowledge of whatever incident it may be that we were looking into.

Q Do you have any recollection of investigation complaints—let me rephrase that, if I may.

Complaints of a gentleman by the name of Ralph Walker during the June to August period of 1976?

A No, sir.

Q Do you have any recollection of investigating complaints of a gentleman by the name of Clifford Bailey in that same time period?

A No, sir.

Q I would ask you the same question with regard to Ronald Cooley.

A No, sir. I don't recall it.

* * * *

[747] CROSS-EXAMINATION

BY THE DEFENDANT WALKER:

Q You identified me, you know who I am?

A I recognize your voice. I didn't recognize you before.

Q Right. Do you recognize this, Major Long?

A Yes, I do.

Q What is it?

[748] A It looks like a log book.

Q Would this type of log book be kept in each housing unit?

A Yes, sir.

Q And to your knowledge would this log book contain the daily reports or a concise summary of what happens in the cell block every day?

A It should contain a summary, yes, sir.

Q And, in your capacity as the Major at that particular institution at the detention facility at 1901 D Street, do you ever read or go through this log book?

A Occasionally, I go through the log book, yes, sir.

Q Now, were you aware of the conditions that existed there in the Northeast 1 housing unit from July 11th until August 26th, 1976?

MR. SCHAARS: Objection, Your Honor. It is beyond the scope of direct examination. This gentleman has been available for a week. If Mr. Walker had wanted him in his case—

THE WITNESS: I am aware of certain conditions, Mr. Walker, if you could be specific.

BY THE DEFENDANT WALKER:

Q All right. Let me rephrase my question to come in line with Mr. Schaars' testimony. Have you ever received any complaints concerning the conditions that existed in the [749] Northeast 1 housing unit?

A During the course of my duties I have received complaints concerning showers, food, sick call, maybe some other complaints and I have, as you well know, made occasional trips to the unit, and took action within my capacity at that time.

Q All right. Have you ever received any complaints concerning burning and smoke inhalation and that type of thing?

A Yes, I have.

Q All right. Were any of these complaints written complaints or petitions?

A I do not recall any written petitions, Mr. Walker.

Q All right. What action, if any, did you take concerning the complaints of the burning and smoke inhalations?

A I tried to correct those deficiencies that may have existed within the unit wherein an inmate may not have gotten his linen and in accordance with our daily schedules—

Q I'm not speaking about the linen, Major Long. I'm speaking about the burning and smoke inhalation. I'm asking you what, if anything, did you do to correct those deficiencies as far as the burning and the smoke inhalation were concerned?

A Well, within my capacity I had instructed all inmates going into the unit be searched and matches be withheld and yet there is still—would still be some burning and smoke within the unit.

* * *

[752] [BY MR. ROBBINS:]

Q Do you remember how many such investigations you made during July and August of 1976?

A No, sir.

Q Any rough idea?

A No, sir. During the last weeks of June and the first weeks in July I was on a vacation for three weeks.

Q After that?

A Dozens. Routinely, it is on short notice. I don't [753] have an average. To my peculiar position, I may wind up with two or three complaints a week or it may be two or three a month.

Q Is there any sort of committee to set up to investigate those complaints?

A Well, we have various avenues of redress for the inmate. An inmate can make a complaint to any staff member that he deems appropriate. He doesn't have a

chain of command or by any one person that he has to direct it to in order to bypass circumvention of a complaint, by correctional officers. There are mailboxes installed in the housing unit that an inmate may put a written request in a sealed box, and this is picked up by, there again, a correctional officer, but not anybody working in a particular unit.

Q So, there is no standard way of making such a complaint?

A Case workers, social workers, visitor service, legal aides, telephone calls to their attorney, et cetera.

* * * *

[755] [BY MR. DRURY:]

Q Were you responsible or did you take responsibility for the escape that occurred on August the 26th?

[756] A No, sir.

MR. SCHAARS: Objection, Your Honor, this is not relevant to anything, whether this gentleman has responsibility or anyone else does. It is not pertinent to this case.

THE COURT: I'm inclined to agree that that is not. If you have something you think is material—

MR. DRURY: Your Honor, I believe that it goes to the possibility of bias on the testimony of Mr. Long, whether he was found irresponsible in his operations as a result of the escape has a pertinent part in the question of bias or prejudice in his testimony and I believe that I should be allowed to inquire into it.

THE COURT: Well, I question the relevance of it in view of the ruling I have previously made.

MR. DRURY: Then, do I understand that Mr. Schaars' objection is sustained?

THE COURT: Yes.

BY MR. DRURY:

Q Now, you have looked down at defendants' table and have been unable to identify Clifford Bailey, is that correct?

A If I may—

Q Did you not get a good look at it the last time?

A I know Mr. Bailey. Okay. I'm looking at Mr. Bailey right now.

Q You are?

[757] THE DEFENDANT BAILEY: I know you know me.

THE WITNESS: I know Mr. Walker. I know Mr. Cooley, but when I looked down, I did not recognize the gentleman.

BY MR. DRURY:

Q You weren't—just weren't able to identify them at that standpoint?

A That is correct. I would hope that you would want my honest opinion as I saw it at that point.

Q I see. But you knew Clifford Bailey as an inmate of dead lock, didn't you?

A Yes, yes, sir, right.

Q And, did there come a point in time in June or July that you discovered that one, Clifford Bailey, was on dead lock?

MR. SCHAARS: Your Honor, I object. It is beyond the scope of direct examination. Again, this gentleman has been available for Mr. Drury, Mr. Walker and Mr. Robbins. He has been here a whole week.

THE COURT: When a witness is called on rebuttal normally he is subject to cross-examination within reasonable limits. I don't know in what direction the questioning is going to take—

MR. DRURY: It is not going to go very far afield.

THE COURT: There is a very narrow scope left of this case.

[758] BY MR. DRURY:

Q Did you in June or July, I understand from your testimony that the latter part of June and the early part of July, you were on vacation, but did there come a point in time in the summer of 1976 that one, Clifford Bailey, was on dead lock?

A I don't recall when. I'm sure on August 26th, I was aware that he had been on dead lock.

Q Did you ever become aware of the fact that an inmate on dead lock had filed a civil action against one of your police officers?

A No, sir.

Q Do you know now that Clifford Bailey has a civil action in Superior Court against Mr. Graves, an officer of your station?

A I am aware of that now.

Q When did you first learn of that, sir?

A I don't recall the exact date. It did not concern me directly. I did see a copy of a writ I think, some week or two weeks ago. Another staff member that was in the facility, Captain Dickinson, I believe.

Q Was this a complaint filed by Mr. Bailey against Mr. Dickinson?

A I don't recall, sir.

Q But you did become aware of it at some standpoint and [759] are you stating that it was August 26th, the date of the escape that your attention was drawn to the name of Clifford Bailey as being one of the inmates who had escaped?

A Yes, sir.

Q I see. Now, do you ever sit on the Adjustment Board?

A Occasionally, when Mr. Robinson is absent, I would fill in as chairman of the Adjustment Board, yes, sir.

Q Do you pay particular attention to the cases that come before you?

A Certainly, sir.

Q Especially if they concern escape matters or matters of that nature, is that right?

A On the Adjustment Board, I would pay strict attention to the incident at hand.

Q Wouldn't you also pay strict attention to any assault that was against a guard, is that correct?

A That is.

Q And any assault that might be, alleged by an inmate, that was perpetrated by a guard?

A I would think so, yes, sir.

* * * *

[768] MR. DRURY: Your Honor, I would move for a motion, for judgment of acquittal at this time.

MR. ROBBINS: I join in.

MR. DRURY: On various grounds. I am sure the Court is desirous of getting two arguments this afternoon. If so, Your Honor, I would like to make a series of motions. I would feel much more comfortable if I could make them at the bar as opposed to at the bench.

THE COURT: All right.

MR. SCHAARS: I take it, with the jury excused, is that what he is talking about?

[769] THE COURT: Yes.

(In open court:)

THE COURT: Ladies and gentlemen, step into the jury room, briefly. The Court understands we have taken all of the testimony we're going to take. We just have some questions of law to determine.

(Whereupon, the jury retired to the jury room and the following proceedings were had:)

MR. SCHAARS: Your Honor, may I excuse all of my witnesses who are still here?

THE COURT: The Marshal will excuse your witnesses.

MR. SCHAARS: Thank you, Your Honor.

MR. DRURY: Your Honor, first of all, I believe that this morning's events in which Mr. Walker collapsed at the lecturn, I believe that there should be notice on the record that this did occur and perhaps a description given by perhaps the Court or stenographer or the prosecutor.

I believe that it is necessary, Your Honor, as a basis for the motion that I made immediately after the Court resumed at the—approximately, no, I'm sorry, about 10:45 or 11:00 o'clock. I want that on the record. I did move, as the Court is well aware of, for a mistrial as far as Mr. Clifford Bailey goes.

Secondly, Your Honor, I would like the record to show that yesterday or on Saturday at approximately 10:45 [770] or 11:00 o'clock, Mr. Robbins and I submitted an

instruction on duress to the Court and I assume that the Court did review it.

THE COURT: Yes.

MR. DRURY: And did reject it, based on the statements that the Court has made throughout. Secondly, Your Honor,—or, thirdly, I believe that the Court's ruling this morning and throughout the day that there will be no duress instruction.

THE COURT: The specific reason for that, Mr. Drury is that as a condition for arguing that to a jury there must be a showing that the man who escaped or who left custody turned himself in. And failure to turn one's self in precludes the arguing of that point of law in the Court's judgment.

MR. DRURY: Yes, Your Honor. I understand that, but I believe that in this case, even though the Court were to accept that as the established law in the District of Columbia, I respectfully submit there is no precedent for it in the District of Columbia and I assume the Court has gone outside and sought other authority.

THE COURT: There is no case in point.

MR. DRURY: I believe, also, Your Honor, that the issue in this case and I believe it was last Thursday, I argued for the distinguishing of this case from the four other cases that have been cited in the Government's memorandum, but I do not wish to rehash those arguments again. The Court is [771] well aware of them. But, I believe this, Your Honor, a duress instruction is appropriate as to my client, because the testimony has shown that there was and it can be interpreted by the jury, that there was a continuing duress on the part of my client.

First of all, Your Honor, duress occurs at the time the man makes the mental decision to leave the jail. The testimony in this case, Your Honor, showed as far as Clifford Bailey is concerned, that he got out of his cell in the morning. He looked out the window. The realization of everything that had gone through the summer of 1976 came upon him and he left, Your Honor. He left and at that point the defense of duress comes into being. I believe, also, during the period of time that he was—he

left the jail, there is sufficient testimony for the Court to give an instruction that this man realized that any return to the jail, Your Honor, any return to any type of law enforcement authority, would submit him to the same type of punishment that he had endured throughout the summer and that any surrender in itself would in no way alleviate the problems that this man had encountered during the summer of '76. Accordingly, I urge an instruction on duress.

THE COURT: I don't think it is appropriate under these circumstances of this case. The Court well recalls the big jailbreak case, which was tried in this courtroom involving Bridgeman and others. The same argument was made and at that [772] time, you may recall, maybe you don't recall, Judge Bryant, my colleague, had before him for consideration the whole issue of conditions at the jail. The reason for the insurrection that occurred down there. Counsel, who presented that were public defenders. Those people were available to these people had they wished to take the step. They didn't take it. So they forfeited the opportunity of making the duress argument.

MR. DRURY: This was in the Bridgeman case, Your Honor?

THE COURT: No, your people. Your people.

MR. DRURY: Are you saying, Your Honor, that they should have contacted the public defender service?

THE COURT: Certainly. That was an alternative. They are concerned about the conditions of the jail. They are concerned about what may have been done to them. They're concerned about retribution down there. Those are things that Bryant took care of when the matters were brought to his attention. They weren't brought to my attention in this case.

MR. DRURY: My client was not so concerned about the conditions of the jail. He was concerned—our defense has been, distinctly different from the defense in the Bridgeman case.

THE COURT: Yes.

MR. DRURY: It has been based on a personal animosity caused by this man's assertion of his constitutional rights. [773] His right to an attorney. His right to file

civil suits against the appropriate authorities. Threats, that I believe have—

THE COURT: Mr. Drury, I'm not going to argue the matter with you. I hold you in high regard as a member of the Bar. For that reason I asked you to take this appointment. I know it is a difficult appointment for counsel to take, but because of the feeling I have for your legal ability, I did appoint you in this case. I know sometimes lawyers disagree. I disagree with you about the applicability of the defense in this particular case.

MR. DRURY: I understand.

THE COURT: You may be right. I may be wrong. I haven't been right in all my judgments. I don't know any judge who is and if I am wrong, the Court of Appeals can correct me.

MR. DRURY: Yes, Your Honor. I wanted it on the record, though, Your Honor, that I have made this motion.

THE COURT: Yes, I understand you made the motion. You are renewing the motion at this time.

MR. DRURY: Does this prohibit counsel from arguing that there was no specific intent to leave the jail, that the act—

THE COURT: You don't need specific intent. This is a general intent offense, and I will so instruct the jury.

MR. DRURY: Well, will the Court allow counsel the leeway to argue that there was no, I believe the indictment does [774] charge willfully and voluntarily—

MR. SCHAARS: Willfully, not voluntarily, Your Honor. It says willfully.

THE COURT: As was pointed out to one of the cases to which the Court's attention is drawn, a judge instructed specific intent was the law of the case, and for that reason a general intent instruction was regarded as being wrong, but not plain error. You may remember the case.

MR. SCHAARS: I believe that is the Woodring case.

THE COURT: I think that is a Fourth Circuit or Fifth Circuit case. In any event, I'm not going to make that error. The intent involved in this case, the intent is general intent, and the indictment does charge unlawfully and willfully free from custody.

MR. DRURY: Your Honor, I understand the Court's instruction. Thank you. I would like the record to show though, I have a copy of my proposed instructions that Mr. Robinson and I submitted and I would like to submit this at the close of the case, knowing that—

THE COURT: Oh, yes, that will be filed and rejected, but because of the fact that—

MR. DRURY: I think the Court has my original copy.

THE COURT: Yes, I do.

MR. DRURY: Could that be made part of the record? May I have that for my document?

[775] THE COURT: Certainly.

MR. DRURY: Does the Court have a copy?

THE COURT: I thought I did, Mr. Drury.

MR. DRURY: I will make a copy of it, Your Honor.

THE COURT: Wait a minute.

MR. DRURY: Thank you.

THE COURT: Yes, thank you.

This will bear the Court's notation, denied as submitted.

MR. DRURY: Okay.

MR. ROBBINS: Your Honor, rather than restating Mr. Drury's argument, I would just like to go on the record as joining in those requests and motions and also at this time make a motion for judgment of acquittal and submit it to Your Honor.

THE COURT: All right. Submitted and denied, Mr. Patterson, for the record.

THE DEPUTY CLERK: Yes, Your Honor.

THE DEFENDANT WALKER: Your Honor, I'd like to join in on Mr. Drury's motion for acquittal. However, I have one thing to say here. I think that in using analogous cases, or analogous case circumstances as far as the criteria is concerned, the Court is now using Lovercamp, which set forth five conditions—

THE COURT: The Lovercamp case is—

[776] THE DEFENDANT WALKER: Five conditions for the defense of—

THE COURT: You mean the California case?

THE DEFENDANT WALKER: People versus Lovercamp.

MR. SCHAARS: That is it.

THE DEFENDANT WALKER: Right. And those five conditions that were set forth, I feel that I personally have met all five of these conditions as far as the duress defense is concerned.

I definitely feel I was shown with a specific threat of death and substantially bodily injury in the immediate future through the showing of the attacks, as far as my epileptic seizures were concerned, and as far as the fires and the smoke inhalation were concerned. I feel that I have also shown that there is no time for complaint to the authorities for that there exists a history of futile complaints, which may result in some complaints seeming illusory.

Now, I think that I have shown that I did complain to the authorities on numerous, different occasions and wasn't able to get adequate medical care, and wasn't able to get any type of relief so far as the smoke inhalation was concerned. I tried to exhaust all of my administrative remedies before coming into the court, and consequently, there was no time for my reporting to the courts because the dangers I felt were imminent, as well as terminal.

[777] Now, I think that I showed that there was no evidence of force or violence used toward any prison personnel or any other innocent persons in the escape.

Number five, as far as the prisoner immediately reporting to the proper authorities when he has attained a vicinity of safety from the immediate threat, I think I showed I did that. Now, whether or not the jury accepts the fact that my testimony concerning the fact that I did report to the proper authorities, I feel that that is a case for the jury to decide and not a case for Your Honor to decide himself, the fact that I had met the criterion that were set forth in the Lovercamp case. I move at this time that Your Honor do give an instruction on duress for the Defendant Walker-El.

THE COURT: Well, Mr. Walker, taking your testimony in the light most favorable to you, you did not tell

them where you were. You did not tell them from what number you were calling. You gave them no means whereby they could pick you up and take you into custody nor did you get in touch with the public defender or any other institution that could have filed your petition and sought the relief that you sought. That is why I'm taking the action that I am taking.

THE DEFENDANT WALKER: All I can say is that—

THE COURT: I want to say this to you, Mr. Walker. The Court regrets that your life has been lived as you have lived it. You have shown that you are a person of considerable [778] mental ability. It is regrettable that you didn't get an education, that you didn't equip yourself in the law or some other profession which you certainly have the mental attributes.

THE DEFENDANT WALKER: Your Honor, I would just like the Court to know my objection.

MR. SCHAARS: May I inquire?

THE COURT: I do.

MR. SCHAARS: May I inquire of counsel for the defense as well, the nature of the instruction to be given on duress and the conditions of the jail, I think this will be of some assistance in argument.

THE DEFENDANT WALKER: What did you say, Mr. Schaars?

MR. SCHAARS: I will repeat that for Mr. Walker. I would like to know what the Court intends to instruct the jury with regard to conditions at the jail and the defense of duress.

THE COURT: I am going to instruct the jury pretty much the way I instructed them in the Gorham-Bridgeman case, on—

MR. SCHAARS: That is, that conditions in the jail are not pertinent, is that it, Your Honor?

THE COURT: Had these men notified the authorities or the public defender in an effort to surrender under conditions that might have been arranged by the public defender, then I would have permitted the duress and condition argument. In fact, I have here an instruction, which I drew up very [779] carefully with that in mind,

but I realized that at the end of which I was calling upon the jury to make a finding that they couldn't make, that is to say that these men had turned themselves in and that is a prerequisite to the assertion of the defense of duress, or coercion. So, for that reason I decided that I had to assume the responsibility myself.

MR. SCHAARS: I understand that, Your Honor. At the beginning I asked whether or not the Court intended to instruct counsel and the respective defendants in this case as to the prohibition for arguing jury nullification. That is the jury may totally disregard the instruction.

THE COURT: I asked the jury to follow the Court's instruction. Juries don't always do it.

MR. SCHAARS: I'm not asking for that instruction. I know the Court does that. I'm asking for an instruction to counsel at this time out of the presence of the jury that may be prohibited from arguing that, based upon the ruling of law of this Court, I'm suggesting it is improper for counsel to try and get around the instructions by arguing in effect that they should ignore everything that you have said.

THE COURT: No, I don't think counsel is going to do that. I don't think Mr. Walker is going to do that.

MR. SCHAARS: I'd like a strict ruling from the Court that that is not going to be permitted. That is all. Jury nullification has no dignity in the law.

[780] THE COURT: That is what South Carolina tried to do at the time of the Civil War, found out what happened to it. They don't permit that in this court.

MR. DRURY: Have you seen the Government's instruction in this matter?

THE COURT: Yes. The Government submitted a series.

MR. DRURY: Have you modified those or are you going to include those?

THE COURT: Well,—

MR. DRURY: Verbatim?

THE COURT: I don't think I have ever given any instructions verbatim that were submitted to me by counsel. I don't recall such a case.

* * *

[781] Now, I would, with respect to proposed instruction Number 2, tell the jury what the essential elements of the offense are, which is the second paragraph of the instruction. I do not read the indictment at the time of the charge.

* * *

[790] THE COURT: Now, ladies and gentlemen of the jury, it becomes the Court's responsibility to charge you as to the law in this case.

* * *

[799] Now, ladies and gentlemen, I wish to instruct you about a concept we call intent. It is important in any criminal case.

Intent means that a person had the purpose to do a thing. It means that he made an act of the will to do the thing. It means the thing was done consciously and voluntarily and not inadvertently or accidentally.

Some criminal offenses require only general intent, and that is true, ladies and gentlemen, of the offenses charged in this case.

Where this is so, and it is shown that a person has knowingly committed an act which the law makes a crime, intent may be inferred from the doing of the act.

Now, intent ordinarily cannot be proved directly because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer as to the defendant's intent from the surrounding circumstances.

[800] You may consider any statement made and act done or omitted by a defendant, and all of the facts and circumstances in evidence which indicate his state of mind. You may infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. However, you should consider all the circumstances in evidence that you deem relevant in determining whether the Government has proved beyond a reasonable doubt the defendant acted with the requisite intent, in this case general intent.

Now, we say that an act is done willfully if done knowingly, intentionally, and deliberately. So much,

ladies and gentlemen, for the general instructions in the case.

I will now turn to the indictment, which you may take to the jury room with you, and I will give you each of the essential elements which constitute the offense which is charged in this indictment.

Now, with respect to each of the defendants who is on trial in this case the Court instructs you that defendants convicted either in this federal court or in the Superior Court of felonies, or in the federal court throughout the country are committed to the custody of the Attorney General of the United States. This is a general practice and the Court will take judicial notice of it and instruct you accordingly.

Prisoners, such as two of the prisoners in this case, [801] defendants in this case who are convicted in another jurisdiction and who were in the custody of the Attorney General, were brought to this jurisdiction as the documentary evidence shows, because they were summonsed as witnesses by another defendant in a proceeding then pending in the District of Columbia court. They are still under the custody today of the Attorney General regardless of how they happened to be brought into the District of Columbia Jail.

Now, the essential elements of the offense charged in Count One against the defendant, Clifford Bailey, each of which the Government must prove beyond a reasonable doubt to justify a conviction or a finding of guilty. These essential elements are as follows: First, that at the time of the offense charged in the indictment, that is to say August 26th, 1976, the defendant in question, Mr. Bailey, had been convicted of a felony.

Now, with respect to this first essential element of the offense, the Government has offered in evidence and the Court has received certified copies of the conviction and judgment and commitments in the case of Mr. Bailey, as the offense is charged in Count One, the defendant was convicted in the District of Maryland, United States Court for the District of Maryland.

And at the time the offense took place he was serving time for this conviction. He happened to be in the Dis-

trict of [802] Columbia because he was subpoenaed as a witness for another defendant whose case was being considered in the Superior Court for the District of Columbia.

The second essential element which the Government must prove beyond a reasonable doubt is that as a result of the conviction the defendant was committed to the custody of the Attorney General or designated representative, and was in custody at the time of the offense. The Government relies for proof of this essential element on the records of the District of Columbia Department of Corrections. As the Court earlier indicated to you, that so far as the defendants Bailey and Walker are concerned, a certified copy of a writ of habeas corpus ad testificandum. That is the means whereby a defendant may be brought from another jurisdiction to serve as a witness if he is subpoenaed by anyone.

Anyone can subpoena a witness if he is in litigation, and that is what the record shows in this case. He remains in the custody of the Attorney General to whom he was committed or committed in connection with the conviction previously mentioned.

The third essential element of the offense of escape as charged in the first three counts, the Federal Counts, is that the defendant escaped from such custody. The question is simply, whether the defendant without authorization did absent himself from his place of confinement. [803] You have heard the evidence in the case, both insofar as the documents are concerned, so far as the testimony of the defendants is concerned when they elected to take the stand as witnesses in their own behalf.

So, I would say to you as to procedure, take the general instructions the Court has given you. Take the facts as you find them. Make your determination as to whether the Government has proved each of the essential elements of the offense of escape. If you are satisfied that the Government has proved each of these elements beyond a reasonable doubt then you may find the defendant whose case you are considering and consider the cases individually and separately, you may find that defendant guilty.

On the other hand, if you have a reasonable doubt as to whether the Government has proved any one of these essential elements, then you must find that defendant not guilty.

Now, as the Court previously indicated to you when it defined the concept of intent, the intent which is involved in Section 751(a) of Title 18, the Federal Escape Statute. That intent is the general intent, and it means only that a defendant has the purpose to do something, the will to do the act. It means the act was done consciously and not inadvertently or accidentally.

So, ladies and gentlemen, so far as the counts involving these defendants, Count One, Count Two, and Count Three charged [804] each of these defendants with violation of the Federal Escape Statute, Title 18, Section 751(a).

If you find any one of these defendants guilty as charged under the Federal Escape Statute as the Court previously indicated to you, you may not consider the District of Columbia statute which charges prison breach. Although, if you find each defendant guilty of the federal violation charge in the first three counts your work is over and you will return your verdict to the Court.

Similarly, if you find any one of these defendants not guilty of federal escape, then and then only do you need to go on to consider Count Four, Five and Six, which charge a violation of the District of Columbia Statute known as Prison Breach.

* * * *

[806] Now, ladies and gentlemen, the question has been raised during the course of this trial as to conditions at the District of Columbia Jail. I wish to say this to you with respect to that institution:

You are instructed as a matter of law that conditions at the District of Columbia Jail or the new detention center, no matter how burdensome or restrictive an individual inmate may find them to be, are not a defense to the charges in this case, nor justification for the commission of the offense of escape.

If a particular inmate or group of inmates feel that they have been treated unfairly, they may seek correction of those conditions in the court system, but they are not entitled to commit the offense of escape or seek to take the law into their hands.

Now, the Court permitted the defendants to introduce this evidence and to seek to show that following their escape they turned themselves in, for if one, after escaping has turned himself in, then the defense of coercion or duress may be brought to the attention of the jury as a defense, but only if a defendant turns himself in.

Now, there are recognized procedures for this to be done, and requisite protections insured by such action. As the [807] Court heard the evidence, that was not done in this case. So the Court felt that it was incumbent upon the Court to assume responsibility for this aspect of the case, and to take it out of the case in effect. So, you are not to consider the defense of duress or coercion for the reasons stated. The defendants did not turn themselves in.

* * * *

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 76-735-3

UNITED STATES OF AMERICA

v.

JAMES T. COGDELL, DEFENDANT.

Washington, D.C.
May 6, 1977

The above-entitled matter came on for hearing on a Motion to Dismiss at 3:20 o'clock p.m., before:

HONORABLE OLIVER GASCH,
United States District Judge.

APPEARANCES:

STEVEN SCHAARS, ESQUIRE,
Assistant United States Attorney,
Appearing on behalf of the Government.
ALBERT OVERBY, ESQUIRE,
Appearing on behalf of the Defendant.

[11] THE COURT: Now, we have a request for witnesses.

What is the expected testimony of the witnesses?

The Court, through its courtroom clerk, requested that information earlier.

MR. OVERBY: I am sorry?

THE COURT: The Court has previously requested the information with respect to the prospective testimony of the [12] witnesses.

MR. OVERBY: The testimony of the witnesses is as follows—

THE COURT: Individually, because I am not going to bring in all of these people. I want to know the substance of the testimony and its materiality.

MR. OVERBY: I cannot break them out individually myself, Your Honor.

THE COURT: When can you do that?

MR. OVERBY: I cannot do that until such time as I have an opportunity to talk to them.

THE COURT: Mr. Overby, we are hard on trial. And since the Stewart case in the D.C. Court of Appeals, all of this testimony that I permitted, not all the testimony but a great deal of the testimony that I permitted the three defendants to adduce is, in the Court's judgment, not material to the issue of escape.

MR. OVERBY: I understand that. I have read the transcript of the preceding trial.

THE COURT: If you read the Stewart case, you will understand precisely, and in brief context, the reason for that ruling.

MR. OVERBY: Yes, sir.

THE COURT: And I am not going to bring these witnesses into the courthouse unless I know what they are expected to [13] testify to. Conditions of the jail, no, that is not material.

The only issue is was he committed to the lawful custody of the Attorney General and did he escape from that custody. This is the only issue in the case.

MR. OVERBY: Is Your Honor ruling that with regard to any of those witnesses?

THE COURT: No. I want to know what you expect them to testify to.

MR. OVERBY: It is my understanding that the witnesses listed on that sheet can speak only to the conditions that led to Mr. Cogdell's departure from the jail.

THE COURT: That is not material.

MR. OVERBY: Very well, Your Honor.

* * * *

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 76-735-3

UNITED STATES OF AMERICA, PLAINTIFF,

v.

JAMES T. COGDELL, DEFENDANT.

Washington, D.C.

May 9, 1977

The above-entitled matter came on for trial in open court at 10:05 o'clock, A.M., before:

THE HONORABLE OLIVER GASCH

United States District Judge, and a Jury.

* * * *

[11] MR. OVERBY: With regard to the proffer made by Mr. Cogdell last Friday, with regard to his list of witnesses, I take it that in the Court in its ruling, basing that ruling upon the Stewart case, at least in part, of the District of Columbia Court of Appeals, is taking into account all of the testimony heard by this Court in the case of United States v. Clifford Bailey, Ralph Walker, and Ronald Cooley, pertinent portions of the testimony on the prior trial, because it concerns escape on the same day under the same conditions.

THE COURT: Yes, sir.

MR. OVERBY: What I was going to suggest to the extent that the Court in ruling excluding the witnesses to be proffered by the Defendant Cogdell relied upon that trial, we believe that portion of the record should be incorporated into this record.

THE COURT: Yes. Well, let me state this: Of course, the Stewart case came down subsequent to the trial. The [12] Court mentioned to Chief Judge Newman of the District of Columbia Court of Appeals in a conversation he and I were having at breakfast together during the course of the trial, I guess, and he said, "By

the way we have had the same situation." "We expect an opinion shortly." "I will send you a copy of it." So, that was the basis on which I learned of the Stewart case. The Court feels that where one does escape from confinement for whatever reason in order to avail himself of the defense of duress or coercion he must turn himself in. The Court of Appeals said, immediately. The Court in considering the matter felt that that period of surrender must be within a reasonable time.

However, since Mr. Cogdell did not turn himself in either to the Virginia authorities or to the Federal authorities, the Court rules that he is not entitled to avail himself of the defense of coercion or duress.

MR. SCHAARS: Thank you, Your Honor.

MR. OVERBY: Your Honor, I think given the Court's ruling and given what counsel concedes to be the basic issue in the case, that at this point the record should reflect our proffer with regard to duress and the escape situation itself.

THE COURT: All right.

MR. OVERBY: Of course, Friday the Court ruled as you just indicated and in that connection we should like and do request that our letter addressed to Mr. Patterson be [13] incorporated and made a part of the record in this case.

THE COURT: All right.

MR. OVERBY: And we proffer you have seen it, haven't you? We proffer our copy to Mr. Patterson at this point with the Court's permission.

THE COURT: Certainly. Now, I take it as you indicated on Friday, Mr. Overby, that these witnesses whose names appear on the letter to Mr. Patterson to which you referred, these witnesses would testify in substance as to conditions at the District of Columbia Jail which led to Mr. Cogdell's decision that he was coerced or under duress as a result of which he did escape?

MR. OVERBY: That is correct, Your Honor, and in that—

THE DEFENDANT COGDELL: May I interpose something, please?

THE DEFENDANT COGDELL: In that conditions per se, I'm speaking of bodily harm. I have witnesses to

testify that I am—The conditions were conducive to do bodily harm to me and threats by the authorities and that my duress was a continuing process prior to my leaving, during, and also after I returned to the District of Columbia Jail. Those witnesses can verify that. Not so much as inmate witnesses as the authorities themselves, as recently as May 2nd when I was taken to the law library. I was taken to the law library [14] and the particular official saw me, directed me back to my cell and told the officers to jump on me, and that the state of duress has been continuously in my mind in terms of saying a proffer, did I contact anyone? I may be able to prove that. But, the Court is cutting me off even before I present anything. I may be able to present that. I may have—

THE COURT: Did you turn yourself in?

THE DEFENDANT COGDELL: I may have written letters.

THE COURT: That may be, what you may have done. What did you do?

THE DEFENDANT COGDELL: I think that should come out at trial if the Court permits me to present my witnesses and presenting the conditions and step by step, rather than putting the fifth before the first.

THE COURT: If you can't meet the fifth you can't eat.

THE DEFENDANT COGDELL: I may be able to—You're telling me I can't put the four, the first one on.

THE COURT: The Court's ruling stands.

MR. OVERBY: I take it, if I may, Your Honor, I take it that—well, I am not entirely sure, frankly does that mean that Mr. Cogdell would not be allowed to similarly testify in his own behalf?

THE COURT: As to what?

MR. OVERBY: As to one, the conditions and two, the [15] possibility that he made efforts to start the process of turning himself in.

THE COURT: He may state what he did, of course.

MR. OVERBY: Yes, sir. Thank you, Your Honor.

THE COURT: Not what he may have done.

MR. OVERBY: Very well, Your Honor.

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THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 76-735-3

UNITED STATES OF AMERICA, PLAINTIFF,

v.

JAMES T. COGDELL, DEFENDANT.

Washington, D.C.

May 10, 1977

The above-entitled matter came on for further trial in open court at 10:00 o'clock, A.M., before:

THE HONORABLE OLIVER GASCH

United States District Judge, and a Jury.

[110] Now, ladies and gentlemen, I wish to take up with you a concept of the law which we refer to as, intent. Intent means that a person had a purpose to do a thing. It means that he made an act of the will to do the same. It means the thing was done consciously and voluntarily, and not inadvertently or accidentally. Some criminal offenses require only general intent, and that is true, ladies and gentlemen, of the offenses charged in this indictment. Where this is so, and it is shown that a person has knowingly committed an act which the law makes a crime, intent may be inferred from the doing of the act. Now, intent ordinarily cannot [111] be proved directly because there is no way of fathoming or scrutinizing the operations of the human mind, but you may infer as to the Defendant's intent from the surrounding circumstances. You may consider any statement made or act done or omitted by a defendant and all of the facts and circumstances in evidence which indicate his state of mind. You may infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. However, you should consider

all of the circumstances in evidence that you deem relevant in determining whether the Government has proved beyond a reasonable doubt the Defendant actually had the requisite intent, in this case, general intent. Now, we say that an act is done wilfully if it is done knowingly, intentionally, and deliberately. So much, ladies and gentlemen, for the general instructions in this case.

I will now take up with you the indictment and the instructions which relate particularly to the indictment. You are instructed as a matter of law that an individual held within the District of Columbia, Department of Corrections, pursuant to a court order of commitment or Writ of Habeas Corpus Prosequendum of the Superior Court of the District of Columbia is in the custody of the Attorney General of the United States.

Now, ladies and gentlemen, Mr. Cogdell, the Defendant [112] in this case, is charged in Count One of the indictment as follows: On or about August 26, 1976, within the District of Columbia, James T. Cogdell, having been in the custody under and by virtue of a commitment issued under the laws of the United States by a Judge of the Superior Court of the District of Columbia following his arrest on a charge of a felony, did unlawfully and willfully flee and escape from such custody, which would constitute a violation of Title 18 of the United States Code, Section 751(a). Now, the essential elements of the offense of escape from custody, each of which the Government must prove beyond a reasonable doubt in order to justify a verdict of guilty are as follows:

First, that at the time the offense, that is to say August 26, 1976, the Defendant in question had been in custody pursuant to a commitment issued under the laws of the United States. On that particular date there are certain copies of pertinent court papers on that particular element.

Second, that as a result of the commitment, the Defendant was committed to the custody of the Attorney General or his designated representative, and was in custody at the time of the offense. Insofar as this element is concerned, there are records of the District of Columbia, Department of Corrections, and a certified copy of the

Writ of Habeas Corpus ad Prosequendum. That is to say, these records have been received in evidence. You may examine them [113] in the jury room. You have previously been instructed as to the legal significance of the commitment, the Writs of Habeas Corpus as they pertain to the custody of the Attorney General or his authorized representative.

The third essential element is that the Defendant escaped from such custody. Insofar as the third essential element is concerned, that is escaping, the question is simply: Whether the Defendant, without authorization, did absent himself from the place of confinement. Thus, if you find that the Government has proven beyond a reasonable doubt each of the essential elements constituting the offense charged in Count One, you may find the Defendant guilty as charged.

On the other hand, if you have a reasonable doubt as to whether the Government has proved any one of these essential elements, then you must find the Defendant not guilty.

SUPREME COURT OF THE UNITED STATES

No. 78-990

UNITED STATES, PETITIONER,

v.

CLIFFORD BAILEY, ET AL.

and

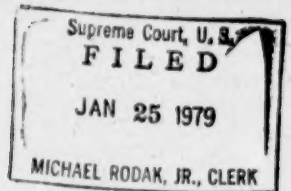
UNITED STATES, PETITIONER,

v.

JAMES T. COGDELL

ORDER ALLOWING CERTIORARI. Filed March 19, 1979.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.



IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

No. 78-990

UNITED STATES OF AMERICA,

Petitioner,

v.

CLIFFORD BAILEY ET AL.,

Respondents.

UNITED STATES OF AMERICA,

Petitioner,

v.

JAMES T. COGDELL,

Respondent.

MOTION OF RESPONDENT COOLEY FOR
LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent, RONALD CLIFTON COOLEY, by his attorney, ROBERT A. ROBBINS, JR., asks leave to file the attached Brief in Opposition in unprinted form and to proceed in forma pauperis pursuant to Supreme Court Rule 53.

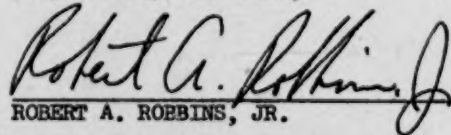
As grounds for this motion, the respondent states the following:

1. He is presently an inmate at the Federal Correctional Institution, Lewisburg, Pennsylvania.

2. He was found guilty in the United States District Court for the District of Columbia of escape from the custody of the Attorney General, 18 U.S.C. § 751(a), and was sentenced to a maximum of five years in prison, to be served consecutively to any previous sentences. The United States Court of Appeals for the District of Columbia Circuit reversed his conviction and remanded for a new trial. The United States has filed a Petition for a Writ of Certiorari to that court with respect to its decision.

3. The respondent has been represented in the courts below by court-appointed counsel. The undersigned attorney was appointed by both the district court and the court of appeals, pursuant to the Criminal Justice Act, to represent him at trial and on appeal, respectively. See 18 U.S.C. § 3006A(a)(6).

Respectfully submitted,


ROBERT A. ROBBINS, JR.

1518 R Street, N.W.
Washington, D.C. 20009
(202) 452-4356

Counsel for Respondent

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-990

UNITED STATES OF AMERICA,

Petitioner,

v.

CLIFFORD BAILEY ET AL.,

Respondents.

UNITED STATES OF AMERICA,

Petitioner,

v.

JAMES T. COGDELL,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR RESPONDENT COOLEY IN OPPOSITION

ROBERT A. ROBBINS, JR.

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Counsel for Respondent
(Appointed by the United
States Court of Appeals
for the District of
Columbia Circuit)

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-990

UNITED STATES OF AMERICA,

Petitioner,

v.

CLIFFORD BAILEY ET AL.,

Respondents.

UNITED STATES OF AMERICA,

Petitioner,

v.

JAMES T. COGDELL,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR RESPONDENT COOLEY IN OPPOSITION

The respondent Ronald Clifton Cooley respectfully requests that this Court deny the United States' petition for writ of certiorari, seeking review of the District of Columbia Circuit's opinions in this case. Those opinions are reported at 585 F.2d 1087 (1978), and at 585 F.2d 1130 (1978).

QUESTIONS PRESENTED

For purposes of this response, the respondent does not seek to rephrase the questions presented by the Government in its petition. His disagreements with those questions are so closely tied with the reasons for denying the writ

that they are discussed below. Should this Court grant review, however, the respondent would seek to defend the judgment of the court of appeals -- reversing his conviction and remanding for a new trial -- by raising the following question:

Did the trial court impermissibly invade the province of the jury with its instruction on the custody element of the offense escape from custody of the Attorney General, 18 U.S.C. § 751(a)? 1/

1/ The trial judge gave the following instruction at the close of the trial:

Now, with respect to each of the defendants who is on trial in this case the Court instructs you that defendants convicted either in this federal court or in the Superior Court of felonies, or in federal courts throughout the country are committed to the custody of the Attorney General of the United States. This is a general practice and the Court will take judicial notice of it and instruct you accordingly.

Prisoners, such as two of the prisoners in this case, defendants in this case who are convicted in another jurisdiction and who were in the custody of the Attorney General, were brought to this jurisdiction as the documentary evidence shows, because they were summoned as witnesses by another defendant in a preceding then pending in the District of Columbia court. They are still under the custody today of the Attorney General regardless of how they happened to be brought into the District of Columbia Jail.

(Tr. 800-801.) The court of appeals said of the first paragraph: "[W]e think it unlikely that the jury was [thereby] confused." (Pet. App. 30a, n. 58.) But after rejecting the claims of respondents Cooley, Bailey and Walker as to the sufficiency of the evidence, the court said, with a footnote reference to the language in the second paragraph:

Although the trial judge's instructions matched the general sense of our holding, we recognize that some portions of the instructions on this matter were confusing and might have invaded the province of the jury. We assume, however, that any such deficiencies in the instructions will be cured on remand.

(Pet. App. 34a, footnote omitted.) As the court's language indicates, the instructions took away from the jury the factual determination of whether the respondents were in the custody of the Attorney General at the time of the "escape" -- an essential element of the crime. (Pet. App. 27a.) This is true with respect to respondent Cooley even though the second paragraph of the above instruction is intended to refer to Bailey and Walker. The general sense of the two paragraphs when read together -- and especially when read in light of the minimal, documentary evidence offered by the government to prove its case, see "Statement of the Case," *infra* -- is this: Regardless of how a defendant gets to the D.C. Jail, he is still in the custody of the Attorney General at the time of an "escape" if he was originally committed to that custody.

Because the trial court directed the jury that the government had proved an essential element of the offense, it impermissibly invaded the province of the jury. *Walker v. New Mexico & S.P.R. Co.*, 165 U.S. 593 (1896). This Court should affirm the judgment below, regardless of what action it takes on the issues raised by the United States in its petition.

STATEMENT OF THE CASE

Respondent Cooley was indicted, along with Clifford Bailey, Ralph Walker, and James T. Cogdell, for wilfully escaping from the custody of the Attorney General on or about August 26, 1976, in violation of 18 U.S.C. § 751(a), and for prison breach, 22 D.C. Code § 2601. Mr. Cogdell's trial on these charges was severed from that of the other defendants.

At the joint trial, the government introduced the following evidence -- and only the following evidence -- in its effort to make out a prima facie case against Mr. Cooley: 2/ (1) a "face sheet" which indicated that he was committed to "D.C. Jail" on April 10, 1976, as a "federal prisoner" (Government Exhibit No. 8); (2) a Judgment and Commitment Order which indicated that he was "committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five years" on May 20, 1976 (Government Exhibit No. 2); (3) an Escape and Apprehension Report dated August 26, 1976, which noted that he had "escaped" from the "Dist. of Col. Detention Facility" on that date; (4) the testimony of the Supervisor of Records at the "New Detention Facility" that there was no record of Mr. Cooley's being released from the facility before August 26 (Tr. 17-18, 27-28); and (5) the testimony of a special F.B.I. agent that he assisted in the arrest of Mr. Cooley on September 27, 1976, at 4229 2nd Place, N.E., in the District of Columbia (Tr. 65).

Respondent Cooley, testifying in his own behalf, indicated that correctional officers beat him a number of times during the weeks immediately preceding August 26 (Tr. 402-405); that he complained about this situation to prison officials and to a D.C. Superior Court judge, but that he felt nobody believed him (Tr. 404-405); that his codefendants forced him to leave the jail on August 26 (Tr. 406); that their threats and his general treatment at the jail operated on his mind as he left the institution (Tr. 424); and that

2/ The evidence against the other respondents was similar in the sense that it was primarily documentary.

although his family attempted unsuccessfully to contact the authorities following his escape, he refrained from doing so himself because he knew no one to call, he knew he was disliked in jail, and he feared both the guards back in jail and the people who would pick him up if he turned himself in (Tr. 407-408, 425-426).

Other witnesses testified to beatings they saw guards inflict on Mr. Cooley and to injuries that he had which could have resulted from these beatings (Tr. 169-172, 372-375, 382-390, 552-555, 605-608, 630, 631). Testimony also showed that fires were set in the cellblock which housed the respondents, as often as once a day (Tr. 150).

At the close of all the evidence, the trial judge refused to give the jury either the "duress" instruction proposed by the respondents or the one he had prepared himself. His sole stated reason for not giving an instruction was the respondents' failure to notify the authorities of their whereabouts or to turn themselves in (Tr. 725). Instead, the judge instructed the jury not to consider the respondents' evidence (Tr. 806), and also instructed it that escape is a "general intent" offense (Tr. 803).

The jury then returned verdicts of guilty against the three jointly tried respondents on the federal escape charges, and therefore, pursuant to the judge's instruction (Tr. 804), did not reach the D.C. Code charges. 3/

The court of appeals, with one judge dissenting, reversed these convictions and remanded for a new trial. 4/

REASONS FOR DENYING THE WRIT

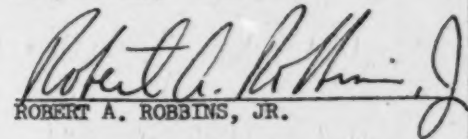
Respondent Cooley wishes to refer the Court to the reasons stated in respondent Walker's Brief in Opposition, which this respondent adopts by reference.

3/ The outcome of respondent Cogdell's subsequent trial was the same.

4/ For respondent's interpretation of the court of appeals' decision see respondent Walker's discussion of it in his "Reason for Denying the Writ," which this respondent adopts, *infra*.

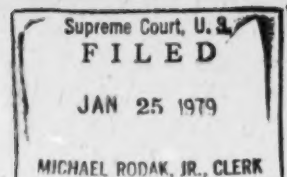
For the reasons contained therein, the petition for a writ of certiorari should be denied.

Respectfully submitted,


ROBERT A. ROBBINS, JR.

1518 R Street, N.W.
Washington, D.C. 20009
(202) 452-4356

Counsel for Respondent Cooley
(Appointed by the United
States Court of Appeals for
the District of Columbia
Circuit)



IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

No. 78-990

UNITED STATES OF AMERICA,

Petitioner,

v.

CLIFFORD BAILEY ET AL.,

Respondents.

UNITED STATES OF AMERICA,

Petitioner,

v.

JAMES T. COGDELL,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR RESPONDENT WALKER IN OPPOSITION

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Attorney for Respondent Walker
(Appointed by the United States
Court of Appeals for the
District of Columbia Circuit)

January 25, 1979

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

No. 78-990

UNITED STATES OF AMERICA,
Petitioner,

v.

CLIFFORD BAILEY ET AL.,
Respondents.

UNITED STATES OF AMERICA,
Petitioner,

v.

JAMES T. COGDELL,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR RESPONDENT WALKER IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in the principal case on the issues raised in the petition, United States v. Bailey et al. (Pet. App. 1a), is reported at 585 F.2d 1087. The opinion in the related case, United States v. Cogdell (Pet. App. 100a), is reported at 585 F.2d 1130.

STATEMENT OF THE CASE

Respondent Walker does not object, for the purposes of the petition, to the Government's statement of the case.^{1/} He has certain disagreements with the Government's description of the decision of the court of appeals, but those are so closely tied to the reasons for denying the writ that they are discussed below.

REASONS FOR DENYING THE WRIT

The petition of the United States has exaggerated the novelty and significance of the opinion below and presents issues which the Government did not press before the court of appeals. There is no reason for this Court to consider any issue relating to the recently developing law of duress and intent in prosecutions for escape under 18 U.S.C. § 751(a) (1976).

- A. This Case Does Not Present Any Significant Question Relating to the Immediacy of Threatened Harm as an Element of the Duress Defense in Escape Cases.

The Government's petition argues in the strongest terms that this case presents the issue whether the "immediacy requirement" is to be "severed * * * from the duress defense." Pet. 2, question 2(a), and Pet. 17-18. The court of appeals,

^{1/} Were this case considered on the merits, a considerably more detailed treatment of respondents' evidence supporting their duress defense would be required. For example, there was testimony not only that fires in the cell block were "frequently set" (Pet. 4), but that they were set "every day" (Tr. 150); testimony that those fires were set not only by "other jail inmates" (Pet. 4), but also at times by correctional officers (Tr. 371, 378, 381). The evidence in support of respondent Walker's epileptic condition was presented not solely by his own testimony, as the petition may imply (Pet. 5 n.3), but by the testimony of several other witnesses as well (Tr. 603-04, 625, 650-52).

however, did not "sever" the immediacy requirement, in part because respondent's evidence manifestly satisfied any reasonable "immediacy requirement" and in part because the adequacy of respondents' duress evidence -- apart from the failure to return to custody -- had been, for all practical purposes, conceded by the Government below.

Although the district court permitted respondents' to present their evidence of duress, at the close of trial it accepted the Government's position that returning to custody was a necessary element of the defense, see People v. Lovercamp, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (1974), and refused to instruct on the duress defense because of respondents' failure to show that they had voluntarily returned to custody. Tr. 725, 777. As the court of appeals later noted (Pet. App. 22a n.43), the trial court expressly stated that if respondents had satisfied the return requirement, it would have instructed the jury on the defense. Tr. 778-79. The Government registered no objection.

On appeal, the Government did not list as an issue on appeal that respondents did not present sufficient evidence of threats of "immediate harm." Instead, the relevant argument section of its brief was devoted to defending the trial court's ruling on its own terms -- that the return requirement was appropriate to the duress defense in escape cases and that respondents had failed to meet it. It was only in a footnote at the end of this argument that the Government may have technically preserved an issue relating to the immediacy requirement.^{2/}

^{2/} The footnote reads:

"Evidence as to the other requirements discussed in Lovercamp was also sadly lacking. The conditions described by numerous witnesses called by the defense could hardly be found to establish

(Footnote continued on next page)

Under these circumstances, the court of appeals below treated the Government as having conceded, for all practical purposes, the adequacy of the duress evidence presented by respondents, apart from the issue of return to custody. The court of appeals stated in a footnote: "Since the court's instruction [on duress] would have been given but for the return requirement, the choice of evils issue in this case turns on the validity of that requirement." Pet. App. 22a-23a n.43 (emphasis added). The language in the court of appeals' opinion upon which the Government relies for the allegedly significant holding appears in another footnote (Pet. App. 21a, n.39), manifestly written in reply to the dissent. Judge Wilkey argued at some length that the respondents had not presented adequate evidence of threats of "immediate harm" (Pet. App. 38a-43a, 63a-64a). In note 39, accordingly, the court of appeals remarked that the trial judge had not agreed with the dissent on this point and stated, in addition, that in its view of the trial court had been correct.

It is true in the last sentence of note 39 the court of appeals acknowledged that the practicalities of escape make it unlikely that nonviolent escape will ever be in response to "immediate threat" if that term is taken narrowly; and it expressed the view that the duress defense should be available in broader circumstances. It made no effort at all, however to elaborate on what degree of immediacy is required before

(Footnote continued from preceding page)

the seriousness, immediacy, and imminence of the alleged danger to appellant's well-being. The record is devoid of any reference to an assault or even the utterance of a threat within two weeks before the escape." Brief for U.S. in Ct. App. 28 n.29.

threatened harm no longer justifies an escape. To the Government, this omission means that the court "amputated" the immediacy requirement from the defense of duress. A more sensible interpretation is that the court believed the testimony of assaults and threatened assaults by correctional officers and of dangerous smoke from fires set every day (as even the dissent acknowledges, Pet. App. 36a), adequate to meet any reasonable test of "immediate harm." No elaboration of the test of immediacy was necessary because the issue was not pressed by the Government on appeal.^{3/}

In sum, the court of appeals did not make a substantial change in the law of duress relating to the requirement of "immediate harm." It briefly found the respondents' evidence of immediate harm sufficient, in the face of a virtual concession by the Government. It made no significant ruling meriting review by this Court.

B. This Case Does Not Present Any Question Relating to Whether an Attempt to Seek Administrative or Judicial Correction of Improper Jail Conditions Before Escape Is a Prerequisite to the Duress Defense.

The Government's petition also appears to argue that this case presents the question whether a prisoner may present a defense of duress to an escape charge when he has failed to avail himself of administrative and judicial remedies to improper jail conditions before escaping. Pet. 2, question 2(b), and Pet. 13,

^{3/} Even if the Government was surprised by the court of appeals' treatment of immediate harm, it did not argue the matter below as a reason for the granting of its petition for rehearing and suggestion for rehearing en banc. Its pressing of this issue in this Court, accordingly, represents a substantial change of position.

17, 20. Such failure would violate another of the five requirements for the duress defense set out in People v. Lovercamp, supra. This issue, to the extent that it is separate,^{4/} was neither preserved nor ruled upon below.

This district court's refusal to instruct the jury on the defense of duress was based solely on respondents' failure to return to custody. Pet. 6. On appeal, the Government did not list the issue of failure to seek administrative or judicial relief as an issue in its brief and not argue such an issue in the relevant section of its brief. Even the footnote that may have technically preserved an "immediate harm" issue (quoted above, note 2), did not mention failure to seek administrative or judicial relief. Finally, the opinion of the court of appeals does not so much as mention the issue.

For all of these reasons, the issue of failure to seek administrative or judicial relief is not properly presented by the Government's petition.^{5/}

^{4/} The Government's petition is not entirely precise on the issue it intends to raise on this matter. The question presented -- number 2(b), Pet. 2 -- combines the issue with that of failure to return to custody -- suggesting that the Government may be raising failure to exhaust administrative and judicial remedies as part of respondents' post-escape conduct. See also Pet. 17. Other parts of the petition, however, particularly the reiteration of the theme that escape must not be a "self-help remedy for undesirable prison conditions" (Pet. 13) makes sense only if the failure to seek administrative and judicial relief before escape is being raised. See also Pet. 20. Respondents contend that no issue relating to failure to seek relief is properly presented; additional reasons for this position with respect to post-escape conduct appear below.

^{5/} It should also be noted that there was evidence in the record of attempts to bring the alleged threats by correctional officers to the attention of authorities, e.g., Tr. 478-80, including a suit by respondent Bailey in Superior Court, Pet. App. 4a-5a n.6. And it is difficult to believe that the Government would argue that the jail authorities would not be deemed to have notice of regular fires in any particular section.

C. The Holding Below on the Failure to Return to Custody As It Relates to Duress Does Not Merit Review by This Court.

The Government contends that the holding of the court of appeals on duress -- that respondents' failure to return to custody did not bar consideration of the duress defense -- constitutes a holding that "the prisoner may remain at large with impunity until such time as the harsh conditions of confinement are corrected" (Pet. 18) and conflicts with the recent decisions of two federal courts of appeals (Pet. 19). Neither contention is correct.

1. The Government Has Inaccurately Stated the Holding of the Court of Appeals on the Failure to Return to Custody and Mischaracterized the Significance of That Holding.

The Government asserts that the court of appeals made a holding much broader than in fact it did. The court of appeals, according to the Government, held that

"even if there was no imminent threatened harm at the time of the escape, the prisoner may remain at large with impunity until such time as the harsh conditions of confinement are corrected." Pet. 18.

The court of appeals had before it a case that presented only one issue on duress: whether the failure to return from custody barred the presentation of a defense of duress on an indictment that charged only the act of departing from the jail. The court did rule, contrary to respondents' argument, that escape was a "continuing offense" -- one that could be committed by failing to return to custody as well as by the initial departure. See Pet. 10a n.17, and 24a-26a. It agreed with respondents, however, that the issue at trial below had been

respondents' conduct and state of mind at the time of the initial departure from jail and nothing else.

"[A]ppellants were indicted for 'flee[ing] and escap[ing]' '[o]n or about August 26, 1976,' and the trial court's instructions, rather than explaining a 'continuing offense' concept to the jury, emphasized the notion that the offense took place when appellants left the jail on August 26. Thus this is not a case where the jury was considering whether a defendant had escaped by failing to return." Pet. App. 25a (emphasis added).^{6/}

Accordingly, the district court had erred in treating respondents' subsequent conduct (their failure to return to custody) as conclusive as to their state of mind and behavior at the time of the initial departure.

"In effect, the trial court denied appellants' right to have the jury consider a duress defense to a crime with which they have been charged (escaping on August 26) because the court found that they would in any event be guilty of an offense under a theory (failure to return) that was never presented either to appellants or to the jury. We cannot sanction such an obvious violation of appellants' constitutional right to jury trial." Pet. App. 25a-26a (emphasis in original).

The court of appeals expressly did not "consider exhaustively the proper prerequisites" to a duress or choice-of-evils defense in escape cases, since it did not know the nature of the instruction almost given by the trial court. (Pet. App. 26a.) There can be no doubt at all that it did not make any holding as to the elements of a duress defense in a case involving an indictment charging escape as a "continuing offense" since such an indictment was not before the court. Thus the

^{6/} The indictment for Walker read: "On or about August 26, 1976, * * * RALPH WALKER, having been lawfully committed to the custody of the Attorney General on April 11, 1973, by virtue of a [federal] conviction and sentence * * *, did unlawfully and wilfully flee and escape from such custody." R. 32.

court did not even suggest, much less hold, that when a prisoner has initially departed jail to escape improper conditions, he "may remain at large with impunity until such time as the harsh conditions of confinement are corrected." (Pet. 18.)

The Government has misconstrued footnote 52 of the court's opinion (Pet. App. 26a), where the court noted:

"An acceptable version of the 'return requirement' would include (1) an instruction that escape is a continuing offense, and (2) an instruction that a choice of evils defense cannot justify continued absence if the conditions establishing the defense (whatever the court determines them to be) do not continue for the period a prisoner remains at large." (Emphasis added.)

The words "conditions establishing the defense" do not refer only to the harsh jail conditions that may or may not excuse an initial departure, but refer to all the conditions ("whatever the court determines them to be") that would be relevant in determining whether continued absence from jail could be excused. There is no justification for suggesting that the court of appeals intended, in this brief footnote, to enter the deep waters surrounding issues not presented in this case and to make the unlikely holding stated by the Government.

A correct understanding of the holding below reveals its extremely limited significance. The court's decision in respondents' favor on the duress issue depended on the narrowly drawn indictment. Had the indictment been drafted -- as we have no doubt indictments in the future will be drafted -- to charge escape as a "continuing offense," respondents would have been faced with the task of justifying not only their initial departure but also their continued failure, thereafter, to return to custody. It is a substantial question -- not addressed by the court below -- whether any of these respondents could

have satisfied a judge that he was entitled to go to the jury on a duress or choice of evils defense relating to continued absence from custody.^{7/}

Since the Government can avoid in the future the immediate consequences of the holding below on the duress defense simply by redrafting escape indictments, that holding is not worthy of review by this Court.

2. The Holding Below on the Failure to Return to Custody Does Not Conflict with the Decisions of Other Federal Courts of Appeals.

The Government principally contends that the holding of the court of appeals on duress -- that respondents' failure to return to custody did not bar consideration of the duress defense -- conflicts with the decision of the Ninth Circuit in United States v. Michelson, 559 F.2d 567 (1977). See Pet. 19. Like the court of appeals below, respondents disagree.

Michelson's evidence of duress concerned fear of assault by another inmate, who was confined in the prison from which Michelson escaped. The Ninth Circuit, like the court of appeals below, held that escape under 18 U.S.C. § 751(a) is a "continuing offense," i.e., one that can be committed by continued absence as well as departure from prison. 559 F.2d at 570. Unlike the court of appeals below, however, the Ninth Circuit manifestly assumed that the "continuing offense" was properly charged in the case before it, for it held that the asserted duress defense did not excuse "continued absence from custody." See, e.g., 559 F.2d at 571:

^{7/} Respondent Walker testified not only that he "contacted the FBI on a number of occasions" after his escape (Tr. 710), but that he had information that the FBI would kill him if they found him (id.). In addition, he testified that he was afraid that he would be returned to the same jail if he were caught. Tr. 711.

"In this case, we need not and do not decide whether defendant acted out of duress in escaping. His failure to report to the proper authorities during his nearly two years of freedom following his escape from McNeil Island Penitentiary precludes jury consideration of the asserted duress defense. Whatever the merits of the asserted duress defense, it did not license continued absence from custody."

Thus the Michelson decision is not in conflict with the decision below on failure to return to custody because it nowhere addressed the consideration found determinative below -- that escape as a "continuing offense" had not been charged in the indictment. The court of appeals below found Michelson distinguishable for this reason. Pet. App. 23a-26a. Judge Wilkey, in dissent, did not charge the court with issuing a ruling facially inconsistent with Michelson; instead, he attacked the court's construction of the indictment and instructions at trial. Pet. App. 60a-63a. The Government does not appear to raise this different matter -- whether these respondents were in fact charged with and tried for departure from jail rather than continued absence -- as an issue meriting review on writ of certiorari; it certainly has not, and we believe cannot, demonstrate a conflict in the circuits on this issue.

The only other federal court of appeals' decision with which the Government claims a conflict on the failure to return to custody issue is United States v. Boomer, 571 F.2d 543 (10th Cir. 1978). Pet. 19. That case differs from the decision below in several respects: the charge was attempted escape, the duress defense did go to the jury, and the relevant issue on appeal was the propriety of an instruction requiring an intent "to report immediately to the proper authorities," 571 F.2d at 545. What is most significant, however, is that the court essentially

relied on the Ninth Circuit's recent decision in Michelson, with which we have shown the decision below does not conflict.^{8/}

The Government states its alleged conflict in the circuits on the duress issue in the following words:

"Other courts have held that, when an imminent threatened harm justifies an escape under the theory of duress, the prisoner must immediately report to proper authorities after the escape and seek a lawful civil remedy for the threatened harm. Pet. 19.

A correct understanding of the limited holding below reveals that the decision below is not inconsistent with this statement of the law, given that respondents were not charged with escape as a "continuing offense."

^{8/} The Government also contrasts the decision below on failure to return to custody with two state cases: People v. Lovercamp, supra, and State v. Boleyn, 328 So. 2d 95 (La. 1976). The manner in which state courts construe state statutes prohibiting escape, and the common law or statutory defenses to such crimes, is of course a different matter from the appropriate construction of a federal statute and the common law defenses appropriate to it. In any event, neither the duress defense nor the choice of evils defense set out in the Model Penal Code contains a return requirement. Model Penal Code §§ 2.09 and 3.02 (Proposed Official Draft 1962). And, as the court below pointed out, two state courts have specifically rejected the Lovercamp rule that return is a prerequisite to a duress defense. See Pet. App. 20a-21a n.37, where the court quoted passages from People v. Unger, 66 Ill. 2d 333, 362 N.E.2d 319 (1977). See also People v. Luther, 394 Mich. 619, 232 N.W.2d 184 (1975), where the court, after listing the Lovercamp conditions, said:

"To the extent that competent evidence may be produced as to any of these conditions, it is relevant to the claim of duress. As such, it should be submitted to the jury." 232 N.W.2d at 187 (emphasis added).

A more recent state decision rejecting the Lovercamp conditions is Esquibel v. State, 91 N.M. 498, 576 P.2d 1129 (1978), where the court said:

"The preconditions set forth in Lovercamp are, in our view, matters which go to the weight and credibility of the testimony upon which the defendant bases his prima facie case [of duress]." 576 P.2d at 1132 (emphasis added).

D. The "Specific Intent" Question
Presents No Issue Meriting Review
By This Court.

The Government presents to this Court the issue of the court of appeals holding that "an intent to avoid confinement" (Pet. App. 8a) is an element of the crime of escape under 18 U.S.C. § 751(a). Pet. 2, question 1, and Pet. 14-16. This holding, it claims, "depart[s] radically from prior analysis of the crime of escape" and "is in conflict with numerous state and federal decisions." Pet. 13.

Rather than departing radically from prior analysis of the crime of escape, the court of appeals below expressly followed the one recent and well-considered decision of a federal court of appeals on the intent element of escape under Section 751(a): United States v. Nix, 501 F.2d 516 (7th Cir. 1974). The Seventh Circuit in that case carefully analyzed the state of the law and various problems that appeared in the cases relating to intent. It found that "[m]ost courts, confronted with evidence that a defendant could not or did not form an intent to leave and not to return, have held such an intent essential to proof of the crime of escape." 501 F.2d at 518. Accordingly, it enunciated a definition of escape as "a voluntary departure from custody with an intent to avoid confinement." 501 F.2d at 519.

The court of appeals below followed Nix and expressly concurred with its definition of escape under Section 751(a). Pet. App. 6a, 8a. That decision required reversal of the judgment below, since the trial judge had not instructed the jury in

those terms.^{9/} See Pet. App. 12a.

In spite of the fact that the court of appeals' decision below echoes that of Nix, and in spite of the fact that the Nix court thought that "courts have been close to unanimous in requiring intent to escape," 501 F.2d at 519 (see also Pet. App. 7a-8a n.13), the Government asserts that "federal decisions have consistently construed the escape statute to require only the general intent to depart from the boundaries of lawful custody." Pet. 15. Three federal decisions are cited for this proposition: United States v. Jones, 569 F.2d 499 (9th Cir. 1978); United States v. Cluck, 542 F.2d 728, 731 n.2 (8th Cir.), cert. denied, 429 U.S. 986 (1976); and United States v. Woodring, 464 F.2d 1248, 1251 (10th Cir. 1972). These decisions are explained more fully in the margin, but the grounds for distinguishing them may be briefly set forth. In Woodring, the issue was not before the Court and the Government relies on one clause of dictum.^{10/} In

^{9/} The jury was instructed as follows:

"Intent means that a person had the purpose to do a thing. It means that he made an act of the will to do the thing. It means the thing was done consciously and voluntarily and not inadvertently or accidentally.

* * *

"[T]he intent which is involved * * * is the general intent, and it means only that a defendant has the purpose to do something, the will to do the act. It means the act was done consciously and not inadvertently or accidentally." Tr. 799, 803.

^{10/} In Woodring, the relevant issue was whether the Government had proved specific intent, since the trial court had instructed the jury that "specific intent must be proved before there can be a conviction." 464 F.2d at 1251. In what the court of appeals below accurately characterized as a "cryptic and conclusory reference" (Pet. App. 12a), the Tenth Circuit said:

(Footnote continued on next page)

Cluck, where the issue was also not presented and the Government relied on a footnote, the court specifically cited the Nix holding on intent and did not repudiate it.^{11/} And in Jones, where a

(Footnote continued from preceding page)

"The instruction on specific intent is not erroneous where willfulness is in the indictment. Even though specific intent is not an element of § 751(a), specific intent became the law of the case when the Court gave Instruction No. 11." 464 F.2d at 1251 (emphasis added).

We note, in addition, that respondents in this case were indicted for escaping "unlawfully and willfully," as the court of appeals itself noted. Pet. App. 13a n.22. See, e.g., p. 8 n.6 supra.

11/ In Cluck, as in Woodring, the case had gone to the jury on instructions requiring a finding that defendant left his place of confinement (here a hospital) "willfully and with the specific intent to avoid further confinement therein." 542 F.2d at 736. The principal issues related to sufficiency of evidence, both respect to custody and intent, and defendant had made "only a vague objection to the instruction on intent." Id. At the beginning of the opinion, the court observed that "[i]n United States v. Nix, * * *, the court defined an 'escape' as being a voluntary departure from custody with intent to avoid confinement." 542 F.2d at 731. It then dropped the following footnote, upon which the Government relies for its alleged conflict (Pet. 15):

"The statute does not in terms make intent an essential element of the offense. The departure from custody must, of course, be voluntary and conscious. [Citation omitted.] In any event, the case was tried on the theory that it was incumbent on the government to prove willfulness and intent to escape and that theory became the law of the case [citing Woodring]." 542 F.2d at 731 n.2.

If it appears that this footnote reserves the question whether the Eighth Circuit concurs with Nix and whether the instructions that were given were proper, this impression is dispelled at the end of the opinion, where, with respect to the instructions on custody and intent, the court said:

"We have considered those instructions along with the other instructions given by the trial court, and we find that the instructions, including the challenged ones, stated the applicable law fairly and correctly and did not invade the province of the jury." 542 F.2d at 736 (emphasis added).

(Footnote continued on next page)

different, though related, issue was presented, the court claimed to be following Nix.^{12/}

In sum, then, there is no conflict in the circuits on the issue of intent.^{13/} In ruling that intent to avoid confinement is an element of escape under Section 751(a), the court of

(Footnote continued from preceding page)

In any event, it is clear that the Eighth Circuit did not have before it the issue of "intent to avoid confinement" as an element of escape under Section 751(a) and, to the extent that it considered the issue, chose not to repudiate the holding of Nix.

12/ In Jones, defendant had failed to return to a half-way house when required to do so by his week-end pass. His prosecution for escape under Section 751(a) thus depended on another statute, 18 U.S.C. § 4082(d), that makes "willful failure of a prisoner to remain within the extended limits of his confinement, or to return within the time prescribed * * *" escape under Section 751(a). Although the court affirmed the trial court's refusal to give defendant's required instruction that proof of "intent to avoid confinement" was not required, the court relied on the adequacy of the trial court's instructions on "willfulness," which "adequately conveyed to the jury the necessity that they find a 'blameworthy' mental state as an element of the offense," citing Nix. 569 F.2d at 501 n.3. The court also appeared to rely on the fact that Jones' intent to violate "the extended limits of his confinement" was undisputed. See 569 F.2d at 501. Jones' pass required him to stay within the county and avoid any criminal activity. The Government proved, and it does not appear to have been disputed, that Jones left the county, travelling 175 miles by bus, was apprehended after committing a burglary, and gave a false name when apprehended. 569 F.2d at 500. It thus appears that Jones was arguing that the jury should have been instructed that it had to find not only an intent to violate the extended limits of his confinement but also an intent never to return to custody. In any event, the Ninth Circuit expressed no disagreement with Nix.

13/ In support of its conflict in the circuits, the Government provides a "see also" citation to United States v. McCray, 468 F.2d 446, 448 (10th Cir. 1972); United States v. Chapman, 455 F.2d 746, 749 (5th Cir. 1972); and Chandler v. United States, 378 F.2d 906, 908 (9th Cir. 1967). Pet. 15. All of these decisions, like Woodring, pre-date Nix, and none of them specifically addressed the question of intent to avoid confinement addressed in Nix and in the decision below. McCray contains no discussion of any issue relating to the petition. Chapman (the only decision from a circuit not represented by Jones, Cluck and Woodring) concerned the question whether the crime of escape could be committed by a prisoner with a legitimate defense of duress (because of fire) to his initial departure; the court ruled that it could if the prisoner thereafter forms "an intent not to return to

(Footnote continued on next page)

appeals followed Nix, the circuit decision most closely on point and the precedent that no other circuit has subsequently disagreed with. While Nix was decided on a different set of facts from those presented below -- hence the efforts of the Government (Pet. 15 n.13) and the dissent (Pet. App. 79a-81a) to distinguish it -- it plainly is the most carefully considered decision on the issue of intent, and it plainly announced a rule going beyond the facts of that case. Until that decision has been repudiated by other circuits -- as the Eighth, Ninth, and D.C. Circuits have declined to do -- there will be no conflict in the circuits meriting review by this Court.

What troubles the Government, it appears, is not so much the basic holding of the court below -- that intent to avoid confinement is an element of escape under Section 751(a) -- but the court's view of what sort of evidence might disprove the required intent. It was only in a footnote that the court below undertook to elucidate the "intent to avoid confinement." There the court said, inter alia:

"[I]f a prisoner offers evidence to show that he left confinement only to avoid conditions that are not normal aspects of 'confinement' -- such as beating in reprisal for testimony in a trial, failure to provide essential medical care, or homosexual attacks -- the intent element of the crime of escape may not be satisfied. When a defendant introduces evidence that he was subject to such 'non-confinement' conditions, the crucial factual determination on the intent issue is thus whether the defendant left custody only to avoid these conditions or whether, in addition, the defendant

(Footnote continued from preceding page)

federal custody." 455 F.2d at 749-50. Chandler ruled, in a similar fashion, that even though defendants may have wandered outside the prison camp while intoxicated, their later decision "to take off for more hospitable climes" constituted escape. 378 F.2d at 908. The latter two decisions were cited with approval by the court of appeals below, in the course of its decision that "continued absence" from prison could constitute the crime of escape under Section 751(a). Pet. App. 10a n.17. The decisions do not conflict with that below on the issue of intent.

also intended to avoid confinement." Pet. App. 9a n.17 (emphasis in original).

The Government protests that this construction "is without support in the common law or the history of the statute." Pet. 14. The Government's commitment to an unchanging common law of escape differs remarkably from its position on other issues in this case. The court of appeals accepted the Government's position that escape under Section 751(a) can be committed by continuing absence from prison as well as by initial departure, though this meaning is not apparent from the words or history of the statute (see Pet. App. 25a n.48); and the court of appeals accepted the Government's expansive notion of "custody," holding that one may escape from the custody of the Attorney General, within the meaning of Section 751(a), even though one has been transferred to the custody of the Superior Court or the Warden of the D.C. Jail (Pet. App. 27a-34a).^{14/}

The concerns that led the court of appeals below to the language in footnote 17 are amply set out in the Nix decision. See also the dissenting opinion of Judge Seiler in the striking case of State v. Green, 470 S.W.2d 565 (Mo. 1971), cert. denied, 405 U.S. 1073 (1972) (escape by 19-year-old inmate to avoid imminent threatened homosexual rape). Those concerns are as old as the crime of escape, and courts have dealt with them in different ways. Modern concern about violence and intolerable conditions in prisons has led in recent years to a re-examination of many

^{14/} The latter issue is presented in the conditional cross-petition for writ of certiorari by respondent Bailey (No. 78-5904) and by respondent Walker (No. 78-5889). The brief in opposition filed by respondent Bailey in this proceeding (No. 78-990) includes additional material (pp. 13-21) in support of his conditional cross-petition (No. 78-5904). Mr. Walker hereby adopts that material in support of his own conditional cross-petition (No. 78-5889). To repeat what was said in the conditional cross-petition, Messrs. Bailey and Walker are identically situated with respect to the custody issues that they have raised.

aspects of the crime of escape. People v. Lovercamp, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (1974), a case upon which the Government relies on the issue of failure to return to custody, is one of the earlier examples of modern concern about the crime. Yet the Government's professed concern that "escape prosecutions will become wide-ranging investigations into the adequacy of prison conditions" (Pet. 16) argues against any defense of duress or necessity to the crime of escape, contrary to the weight of modern authority.^{15/}

The significance of the holding below on intent will depend on the legal rules that develop about the extent of evidence necessary to require specific instructions on such matters as intolerable jail conditions. Such rules have not yet been enunciated by the court of appeals below, and the issue has not yet been considered by the circuits.^{16/} Review of the matter by

^{15/} The Government's full statement is that "escape prosecutions will become wide-ranging investigations into the adequacy of prison conditions, rather than a means of enforcing lawfully imposed criminal sentences." Pet. 16. But it is recapture, not prosecution for escape, that leads to the enforcement of the original sentence. The escape prosecution is to ascertain blameworthiness and to impose an additional sentence for a separate criminal act. Such a prosecution may raise any of a number of burdensome issues for the prosecution (like insanity or, as in this case, custody).

Moreover, the Government's concern that juries will be "dictating to prison administrators the conditions of confinement that are normal and appropriate" (Pet. App. 16 n.14) ignores the fact that it is judges who will be instructing the juries on the proper standards to apply. While some deference to prison administrators is necessary and appropriate, we doubt that the Government means to argue that the history of penal conditions in this country indicates that prison officials may be left unrestrained by law.

^{16/} Since the court of appeals below held that escape under Section 751(a) is a "continuing offense," the question arises what sort of evidence might defeat the "intent to avoid confinement" when one is indicted and tried for continued absence rather than for the act of departure alone. The court of appeals clearly did not consider this question. Since such prosecutions are likely to be the most common in the future, this omission illustrates the uncertain significance of the decision below.

this Court now would lead the Court into a theoretical exercise, unrelated to issues and instructions argued and decided in different circuits.

CONCLUSION

The Government has asked this Court to review a decision that reversed the convictions below on two separate grounds -- one relating to the elements of the defense of duress to escape prosecutions and one relating to intent to avoid confinement as an element of escape. The long range significance of neither decision is plain, given the fact that the indictments below did not charge escape as a "continuing offense." Nor do the claimed conflicts in the circuits on each issue prove to exist in any meaningful sense. The law of escape is a rapidly developing area, in which there are few federal decisions on any particular issue or set of facts. This Court's decision to review the issues in this field now would deprive it the benefit of experience with the rules being announced in the circuits and would deprive it of the considered judgments of more of those circuits.

For all of these reasons, the petition for a writ of certiorari should be denied.

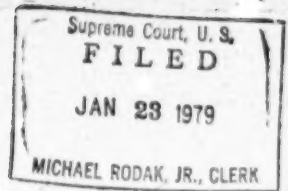
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of Columbia Circuit)

January 25, 1979



IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

No. 78-990

United States of America,
Petitioner,

v.

Clifford Bailey, et al.,
Respondents,

No. 78-5904

Clifford Bailey,
Petitioner,

v.

United States of America,
Respondent,

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

Brief in Opposition in No. 78-990
and in support of
Cross-Petition for Certiorari in No. 78-5904

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Introduction

Respondent Clifford Bailey does not object to the jurisdiction of the Court. Although a more extensive statement of facts will be required if this case is accepted for review on the merits, respondent sets forth a brief statement of facts which are germane to the issues raised by the government in its petition and which supplement the government's statement of facts. There are, in addition, certain facts which pertain only to respondent's arguments set forth in his conditional cross-petition for certiorari in No. 78-5904. These facts, relating to the issue of custody, are set forth separately in Section II of this brief.

The decision of the court of appeals is now reported at 585 F.2d 1087.

Supplementary Statement of Relevant Facts

Respondent Bailey was convicted pursuant to 18 U.S.C. § 751(a) for escaping from the custody of the Attorney General. On the date of the alleged escape, August 26, 1976, respondent was being held in the New Detention Center of the District of Columbia jail, having been brought to the District of Columbia in June from the federal penitentiary in Leavenworth, Kansas, for the purpose of testifying in a criminal case on behalf of the defendant, Brad King.

Respondent acknowledged that he had left the District of Columbia jail without authorization. His defense at trial was that he had escaped because he feared that he might be killed by prison guards. T. 368-69. He testified that he had repeatedly been threatened and beaten by guards at the jail as punishment for testifying on behalf of Brad King. T. 468-69; 530-33; 538; 548; 587-590. The fact that Bailey's life had been threatened and that he had been beaten by guards was corroborated by Oliver Boling, a fellow inmate. T. 368-372.

Respondent was told that if he testified in the Brad King trial he would "never leave the jail alive." T. 469. Major Long told him that he'd leave him hanging "like the guy that was left hanging the Brad King case." T. 469. Bailey further testified that he had been harassed by guards and placed in "deadlock" as an example of what he would get if he testified in the King case. T. 473.

In an attempt to obtain redress for these threats and beatings, respondent Bailey filed a civil suit in Superior Court in early July against various guards. After filing the suit, he was subjected to further threats, harassment, and beatings by guards. T. 529-533. Bailey testified that, after he left the jail, he did not turn himself in because he thought he would be sent back to the D.C. jail and killed. T. 587-88.

Despite this testimony, the trial judge refused to instruct the jury as to the elements of the defense of duress. T. 769-70. Instead, the jury was instructed that any unauthorized departure from the prison would be sufficient to support the escape charge. T. 802. The court also instructed the jury that escape is a general intent offense which requires only "the purpose to do something, the will to do the act." T. 803.

Reasons for Denying the Writ in No. 78-990

I. The court of appeals' decision is not a departure from established principles.

The government begins its argument that a Writ of Certiorari should issue by stating that, "In its decision in this case, the court of appeals has departed radically from prior analysis of the crime of escape." Pet. 13. While the majority's detailed exposition of the law of escape provoked a lengthy dissent by Judge Wilkey, respondent believes that a careful examination of these opinions will justify the majority's observation that

"[t]he essential differences between the court and the dissent center around the proper roles of judge and jury ... and are hardly so far-reaching as the dissent's rhetoric suggests." 585 F.2d at 1092 n. 11. While the majority's insistence on abandoning labels such as "specific" and "general" intent and "duress" and "necessity" in favor of reasoned analysis may be seen by some as a radical change in the law, respondent suggests that the claimed conflicts in the circuits are more apparent than real.

- A. The court of appeals' holding that to establish a violation of 18 U.S.C. § 751(a) the government must prove that the defendant had the intent to avoid confinement does not raise any issue that warrants review.

The most arresting feature about the government's first Question Presented is the manner in which the government has chosen to define the issue decided by the Court of appeals. Seizing on language in a footnote^{1/} by which the majority sought to respond to the dissent's interpretation of the words "intent to avoid confinement", the government frames the issue as whether § 751(a) prohibits escape "only from 'normal aspects of 'confinement'" and does not prohibit an escape motivated by a prisoner's desire to avoid onerous jail conditions." Pet. 2. Respondent Bailey believes that this framing of the issue distorts what the court of appeals held and suggests that the ruling appealed from is much broader than it actually is.

Contrary to the impression created by the government, the court of appeals' ruling as to the elements which the government must prove to establish a violation of § 751(a) is but a narrow application of well-developed principles in the law of escape. Far from making a radical departure from precedent, the court adhered to the analysis adopted by the only other circuit to give

^{1/} 585 F.2d at 1093 n. 17.

the issue thorough consideration.

In the leading case of United States v. Nix, 501 F.2d 516 (7th Cir. 1974), the court came to grips with a fundamental dilemma that results from applying labels like "specific" and "general" intent in defining the offense of escape. The dilemma is caused by the fact that the offense of attempted escape traditionally was regarded as a "specific" intent crime while escape itself required proof of a general intent only. Because of the conceptual and practical difficulties involved in differentiating between escapes and attempted escapes,^{2/} the court rejected a mechanical application and turned instead to an analysis of what constitutes the "escape" element of the crime. United States v. Nix, supra, 501 F.2d at 518. The court concluded that escape is a voluntary departure from custody with an intent to avoid confinement, and that the "defendant under § 751 is entitled to an instruction that includes this mental component as an element of the crime which the government must prove." Id. 519. Since the court's instructions had withdrawn the mental element from the jury's consideration, the conviction was vacated.

In holding that respondent Bailey's conviction must be

^{2/} The court contrasted the situations of two defendants whose appeals had been argued the same day. In each case the defense was intoxication. Nix had been charged with escape while the other appellee, one Peterson, had been charged with attempted escape. The court of appeals said:

The trouble with this approach is the impossibility of drawing a line between escape and attempted escape. Was the difference between Nix' act and Peterson's the eight miles Peterson traveled? Or an overnight absence versus the hours Nix was missing? Any escapee brought to trial was ultimately unsuccessful.

On reflection it will be seen that in cases arising under this statute [§ 751] the line of demarcation between an escape and an attempt to escape is often too shadowy to permit of the laying down of absolutes.
[Footnote omitted.]

United States v. Nix, supra, 501 F.2d at 518.

reversed, the court of appeals specifically relied on United States v. Nix as persuasive authority. Agreeing with the Seventh Circuit that adherence to formalistic labels had spawned a great deal of unnecessary confusion in the law of escape, the court followed the Nix analysis and held that an escape occurs when a defendant (1) leaves custody, (2) voluntarily, (3) without permission, and (4) with an intent to avoid confinement.

In this case, as in Nix, it was the failure of the trial court to instruct the jury properly that required reversal of respondent Bailey's conviction. Plainly, evidence of beatings in reprisal for testimony in a trial (such as that introduced by the respondent in this case), failure to provide essential medical care, or homosexual attacks would be relevant evidence concerning whether a particular defendant left a jail "voluntarily" and "with an intent to avoid confinement".

The government argues that neither the statute nor common law permitted such evidence to be used to demonstrate lack of intent to commit the crime of escape. However, this argument proves too much. We do not understand the government to quarrel with the basic premise that, if certain conditions are met, duress may be a sufficient defense to escape. But traditionally courts were reluctant, on grounds of public policy, to permit the defenses of duress and necessity to be relied upon by escapees at all. People v. Unger, 66 Ill.2d 333, 362 N.E.2d 319, 321 (1977). See also, United States v. Michelson, 559 F.2d 567, 569 & n.5 (9th Cir. 1977). Until People v. Lovercamp, 43 Cal. App.3d 823, 118 Cal. Rptr. 110 (1974), a case relied on by the government, "no reviewing court had ever upheld a defense of necessity in ordinary adverse situations such as threats from fellow inmates." 1975 U.Ill.L.F. 271, 275. The common law is not frozen like a fly in amber but is dynamic and responsive to the changing needs and concerns of society.

The government argues that the court of appeals' ruling in this case conflicts with decisions in other circuits. When the cases cited in the government's petition are scrutinized, the alleged conflict fails to materialize.

In United States v. Jones, 569 F.2d 499 (9th Cir. 1978), cert. denied, 98 S.Ct. 2243 (1978), the defendant had violated the terms of a weekend pass while participating in a pre-release program in a halfway house. He was prosecuted for escaping after he failed to return to his quarters at the appointed time. His defense was based on the theory that he did not have the intent to avoid confinement: the delay in his return was occasioned by the fact that he had journeyed to another city, committed a crime, and was apprehended by the police.

While the defendant was prosecuted under § 751(a), another statute, 18 U.S.C. § 4082(d), dealt specifically with wilful failures of persons in the defendant's situation to remain within the extended limits of confinement. The court of appeals made clear that its holding that the court's instructions were adequate was based upon § 751 and § 4082(d) when read together. 569 F.2d at 501. The court concluded that "[u]nder the circumstances of this case, the instructions given accurately explained to the jury the applicable legal standard" and, in a footnote, cited United States v. Nix, supra. 569 F.2d at 501 n.3. There is no conflict between United States v. Jones and the instant case.

In United States v. Woodring, 464 F.2d 1248 (10th Cir. 1972), the indictment had charged a wilful violation of § 751(a) and the court had instructed the jury that specific intent must be proven to convict. The court of appeals held that specific intent thus became the law of the case. While the court also said, without any citation of authority, that specific intent is not an element of § 751(a), that remark was purely dictum.

The government's reliance on United States v. Cluck, 542 F.2d 728 (8th Cir. 1976), cert. denied, 429 U.S. 986 (1976),

is similarly based on dictum. As in Woodring, the trial court instructed the jury that, in order to find the defendant guilty of escaping from a county hospital, it must find that he left "willfully and with the specific intent to avoid confinement therein." 542 F.2d at 736. Moreover, in the text of its opinion, the court of appeals specifically referred to United States v. Nix, supra, as defining the crime of escape as being a voluntary departure from custody with intent to avoid confinement. ^{3/}

Chandler v. United States, 378 F.2d 906 (9th Cir. 1967), and United States v. McCray, 468 F.2d 446 (10th Cir. 1972), provide no support whatever for the government's claim of conflict. In

^{3/} In a footnote, the court said:

The statute does not in terms make intent an essential element of the offense. The departure from custody must, of course, be voluntary and conscious. See United States v. Snow, 157 U.S. App. D.C. 331, 484 F.2d 811 (1972). [sic] In any event, the case was tried on the theory that it was incumbent on the government to prove wilfulness and intent to escape, and that theory became the law of the case [citing Woodring].
542 F.2d at 731 n.2.

It appears that all the court meant to say by this was that read literally, the statute says nothing about intent. United States v. Snow, supra, cited by the court, supports respondent's position that more than a general intent is required. Snow had been convicted in a non-jury trial of escape from a halfway house. The record, although sparse, indicated that he had been accused of stealing clothing from a room in the house and there had been threats and fighting during the weekend of his escape. 484 F.2d 811 n.3. On appeal, Snow argued that the prosecution had failed to prove that he acted with a criminal intent -- "an essential element of the criminal charge." Id. 811. Snow's claim was based upon the fact that he was in danger of serious bodily harm and, therefore, his leaving was involuntary and not criminal. While the court seems to have treated Snow's claim as one of duress, it is equally as capable of being viewed -- as Snow put it -- as negating criminal intent. In fact, the court of appeals in the instant case stated that one of the traditional categories of duress -- duress by compulsion -- is indistinguishable from the defense of lack of intent. United States v. Bailey, 585 F.2d at 1097. See also, United States v. Spletzer, 535 F.2d 950, 954 & n.4 (5th Cir. 1976).

Chandler, the only issue regarding intent was the time of its formation; in McCray, there was no discussion of the intent element whatsoever. Although each court set forth a definition of the offense covered by § 751(a),^{4/} neither court defined the term "escape". The holding in Chandler that the intent to escape need not be contemporaneous with the initial leaving presents no conflict with anything the court of appeals held in this case.

United States v. Chapman, 455 F.2d 746 (5th Cir. 1972), addressed the same question raised in Chandler regarding the time the intention to escape was formulated. Even though the court did not address the degree of the intent required to sustain a conviction, it did observe that the defendant's "use of a false name and false identification cards when he was apprehended are indications of an intent not to return to federal custody." 455 F.2d at 750 (emphasis added). While arising in a different context, this approximates the standard applied by the court of appeals in the case sub judice.

Finally, it is significant that McCray, Chapman, Chandler, as well as Woodring, were all decided prior to United States v. Nix, which was the first case to give thorough consideration to the definition of escape in § 751(a).^{5/} Even if these cases

^{4/} The two courts defined the offense in slightly different terms, depending upon the specific act in the statute which the defendant was accused of having committed. Chandler states that:

[T]here must be proof of three facts: (a) that there was a conviction, (b) that there was an escape, and (c) that such escape was from a confinement arising by virtue of the conviction. 378 F.2d at 908.

McCray defined the offense as:

The elements of the offense are (1) escape (2) from the custody of an institution where he is confined by direction of the Attorney General (3) pursuant to process issued under the laws of the United States by a court. 468 F.2d at 448.

^{5/} Of course, the Nix court's analysis did not produce a novel result. As the Seventh Circuit found, "[m]ost courts, confronted with evidence that a defendant could not or did not form an intent to leave and not to return, have held such an intent essential to proof of the crime of escape." 501 F.2d at 518.

could be said to conflict with Nix and United States v. Bailey, which we deny, the standard adopted in these latter cases could not have been considered and rejected by these courts.

- B. The government's arguments for review of the court of appeals' holdings regarding the defense of duress either seek to raise issues not properly preserved below or fail to present convincing reasons why review should be granted.

The second question presented by the government seeks to obtain review of a number of distinct issues regarding the defense of duress. Several of these are not properly before the Court.

First, petitioner argues that the court of appeals has made a significant change in the law of duress by eliminating any requirement that the threatened harm was imminent at the time of the escape. Pet. 12. It is clear from the record, however, that the only reason the trial court refused to give the duress instruction requested by the respondents was because it was convinced that they had failed to voluntarily return to custody. Tr. 725, 777. With the exception of a footnote^{6/} in its brief in the court of appeals, the government did not advert to this issue and failed to mention it in its petition for rehearing en banc.

The only discussion of the point by the court of appeals is in a footnote replying to the dissent. 585 F.2d at 1099 n.39. Here the court pointed out that the trial court had evidently concluded that the evidence presented was sufficient to go to the jury but for the respondent's failure to meet the return requirement. The court also pointed out that an inflexible immediacy requirement would be inappropriate in the escape context because substantial danger and the opportunity for escape would rarely coincide. A fair reading of the court's opinion results in the conclusion that it believed the evidence was sufficient to meet

^{6/} Brief of United States in the court of appeals, p. 28 n.29.

any reasonable standard of imminent harm and that it was unnecessary to enunciate standards to govern other cases.

Secondly, the government raises the question of whether a prisoner may invoke the duress defense when he fails to exhaust civil, administrative, or judicial remedies. This issue was neither presented to nor ruled upon by the courts below. As previously indicated, the trial judge was fully prepared to give the duress instruction except for the fact that the respondents had not returned to custody. The opinion of the court of appeals contains no discussion of the issue, which is not surprising in view of the fact that it was neither briefed nor argued.

In any event, respondent Bailey did file a lawsuit in the Superior Court of the District of Columbia to halt the threats and beatings designed to intimidate him from testifying in the Brad King case. T. 481; 585 F.2d at 1091 n.6. After the suit was filed, he was threatened with physical violence if he did not withdraw it and was forcibly put in the mental ward. T. 580-81. It is noteworthy that those who allegedly threatened the respondents included ranking officers, and not just guards, at the jail. T. 469, 472-73.

The government's third claim, the only one properly before the Court, is whether the fact that respondents failed to return to custody after the escape barred the defense of duress. Pet. 18-19. It was for this reason, and this reason alone, that the district judge refused to instruct the jury on the duress defense.

In analyzing the defense of duress, the court of appeals shunned labels for the same reason it had done so in its examination of the intent element of escape. The principle which the court deemed most applicable to the present case was that which excuses criminal conduct because the actor reasonably believes his conduct necessary to avoid a harm more serious than that which the statute defining the offense prohibits. 585 F.2d at 1098. While not disagreeing with the concept that the defense lasts only as long as the defendant is faced with a "choice of evils",

the court held that this was an inappropriate case for its application where the respondents were not charged with escape by failing to return:^{7/}

Although we would be very sympathetic to a jury instruction similar to that in Chapman to the effect that a defendant can "escape" by failing to return to custody even if his initial departure was justified and that a choice of evils defense to escape must therefore justify not only a defendant's original departure but also his continued absence, no such instruction was given in this case ... Thus, this is not a case where the jury was considering whether a defendant had escaped by failing to return. 585 F.2d at 1100. (footnotes omitted)

Thus the court's ruling is confined to the fact that the trial judge had prevented the defendants from having the jury pass upon the duress defense to the crime for which they were charged by deciding that the defense would be unavailable under a theory of liability that was neither charged nor given to the jury. Not only is this issue much narrower than the government would have the court believe, but also it serves to distinguish this case from others cited by the government as being in conflict. See, e.g., United States v. Michelson, supra; People v. Lovercamp, supra.

The government argues that the court of appeals went further and held that an escapee's continued refusal to report to the authorities is excusable under the theory of duress "if the conditions establishing the defense ... continue for the period a prisoner remains at large." Pet. 18. The court did pose the question

^{7/} Respondent Bailey's indictment read:

On or about August 26, 1976, within the District of Columbia, CLIFFORD BAILEY, having been lawfully committed to the custody of the Attorney General on March 6, 1973 and April 18, 1973, by virtue of a conviction and sentence imposed by the United States District Court for the District of Maryland in criminal case Numbers 72-0599 and 73-077, respectively, did unlawfully and wilfully flee and escape from such custody.

of "whether a jury should be allowed to consider an otherwise sufficiently supported choice of evils defense in the absence of one of the special prerequisites some courts have imposed upon such defenses in escape cases -- the requirement that an escapee turn himself in to the authorities immediately after escaping."

585 F.2d at 1098-99. (Footnote omitted). The court analyzed the relevant cases and appears to have concluded that the "choice of evils" defense lasts only as long as the choice of evils justifies a failure to return. 585 F.2d at 1100, 1101 n. 52.

Even assuming, as the government claims, that this finding breaks new ground, the court's judgment on the "choice of evils" defense plainly rests on the narrower ground discussed above. For the reasons stated, that holding does not merit review by this Court.

- II. If the Court should issue a Writ of Certiorari to the court of appeals to review the issues presented by the government, then it should grant Petitioner* Bailey's cross-petition to review the court's disposition of the custody issue.

Questions Presented

1. Whether a federal prisoner, brought to the District of Columbia pursuant to a writ of habeas corpus ad testificandum issued by the Superior Court of the District of Columbia and confined in the D.C. Jail (which is not under the control of the Attorney General) may, following his escape from that institution, be convicted under an indictment charging "escape from the custody of the Attorney General" in violation of 18 U.S.C. § 751(a).

2. Is the determination of whether a prison inmate, in the circumstances described in Question No. 1, is in the "custody of

*/ Bailey is the petitioner in No. 78-5904.

the Attorney General" pursuant to the statute a question of fact for the jury or a matter of law to be decided by the court?

Statement of Relevant Facts

Petitioner Bailey was serving a sentence at the federal penitentiary in Leavenworth, Kansas, when, in June 1976, the Superior Court for the District of Columbia issued a Writ of Habeas Corpus Ad Testificandum requiring his presence as a witness in the case of United States v. Brad King. The Writ commanded the warden of the penitentiary and the United States marshals for Kansas and the District of Columbia to produce him,

[s]o that he may be available to testify for a trial in this cause, presently set for June 14, 1976 and then, upon the conclusion of such proceedings, be returned by either of the aforementioned United States marshals, or a deputy thereof, to the custody from whence he came ...

Petitioner Bailey arrived in the District on or about June 1, 1976 and was incarcerated in the District of Columbia jail. The trial record does not disclose the date upon which he testified or when the Brad King trial came to a conclusion. But petitioner was still in the District of Columbia jail as of August 26, 1977 when he left without permission.

Petitioner was subsequently indicted under 18 U.S.C. § 751(a) for wilfully and unlawfully escaping from the custody of the Attorney General. While § 751(a) makes it an offense to escape from any "custody under or by virtue of any process issued under the laws of the United States by any court, judge or magistrate", he was not indicted for a violation of this provision.^{8/}

8/ Compare Bailey's indictment, set forth in footnote 7, *supra*, with the offense charged in Derengowski v. United States, 404 F.2d 778, 780 (8th Cir. 1968), *cert. denied*, 394 U.S. 1024 (1969). There, the defendant was convicted of attempted escape from confinement "in the custody of the United States of America under and by virtue of a Writ of Habeas Corpus." Derengowski conceded that the Writ of Habeas Corpus Ad Prosequendum issued by the District Court was a civil "process issued under the laws of the United States."

After the prosecution completed its case, petitioner's counsel moved for a judgment of acquittal based, inter alia, upon the fact that the government had failed to prove that he was in the custody of the Attorney General when he was brought back to the District of Columbia under a writ of habeas corpus. Tr. 132-33. This motion was denied.^{9/}

In his charge to the jury, the court instructed it that persons convicted in the federal court or the superior court or in federal courts throughout the country are committed to the custody of the Attorney General and that they "are still under the custody today of the Attorney General regardless of how they happened to be brought into the District of Columbia jail." Tr. 801. This instruction effectively withdrew the issue of custody from the jury's consideration. Petitioner and his co-defendants were found guilty.

The court of appeals rejected petitioner's contention that, after he was transferred on a Writ of Habeas Corpus Ad Testificandum, he was no longer in the custody of the Attorney General but instead was in the custody of the Superior Court.^{10/}

[continued from previous page]

Where a statute sets forth a number of acts which constitute an offense, in order to sustain a conviction the indictment must set forth the specific acts in the conjunctive. "To charge the offense in the disjunctive (as it appears in the strict language of the statute), that the accused did one thing 'or' the other, would make the indictment bad for uncertainty, ..." Joyce v. United States, 454 F.2d 971, 976 (D.C. Cir. 1971), cert. denied, 405 U.S. 969 (1972). Here, of course, the statute does set forth, in the disjunctive, various acts which constitute the offense of escape, but the indictment charged only escape from the "custody of the Attorney General".

^{9/} The court stated that it would take judicial notice that the District of Columbia correctional facility had been designated as an agent of the Attorney General for certain purposes. Tr. 132-33. However, as explained in the text, he gave a different explanation in his instruction to the jury.

^{10/} It is not clear from the court's opinion whether it based this judgment on the fact that Bailey was "confined in an institution designated by the Attorney General for the custody of federal prisoners", or because he remained in the Attorney General's custody "by virtue of" the original commitment. 585 F.2d at 1104.

Although the court of appeals regarded a portion of the trial judge's instructions to the jury on the point "confusing" and expressed concern that the instruction may have "invaded the province of the jury", it left the specific cure to be devised by the court on remand. 585 F.2d at 1101. It is not clear what role the jury is to play in resolving the custody issue, but it appears that it will be a limited one at best.

Petitioner claims, as he did before the court of appeals, that whether or not he was in the custody of the attorney general is a factual question to be resolved by the jury and that, because the government failed to establish a prima facie case at trial, he is entitled to a judgment of acquittal. Furthermore, to the extent that the court of appeals relied upon the fact that petitioner was held in a "designated" facility, it upheld custody on a ground not charged in the indictment. As the court itself pointed out in another context, but failed to apply here, the petitioner was denied the opportunity to have the jury consider the issue of custody because the court found the requirement satisfied by a theory not charged in the indictment. 585 F.2d at 1100-1101.

- A. The custody issue is a fit subject for review on a Writ of Certiorari because the court of appeals' ruling conflicts with decisions of this Court and the courts of appeal and presents an important question involving the interpretation of § 751(a).

In Barth v. Clise, 79 U.S. (12 Wall.) 400 (1870), the court held:

By the common law, upon the return of a writ of habeas corpus and the production of the body of the party suing it out, the authority under which the original commitment took place is superseded. After that time, and until the case is finally disposed of, the safekeeping of the prisoner is entirely under the control and direction of the court to which the return is made. The prisoner is detained, not under the original commitment,

but under the authority of the writ of habeas corpus. Pending the hearing he may be bailed de die in diem, or be remanded to the jail whence he came, or be committed to any other suitable place of confinement under the control of the court ...
79 U.S. at 407. See also, Stallings v. Splain, 253 U.S. 340, 343 (1919).

The court of appeals sought to distinguish Barth v. Clise on its facts, but the distinctions it drew based on policy grounds and "intuitive sense" are unconvincing. 585 F.2d at 1104. In the final analysis, the policies identified by the court are (1) to protect the interest of the sending jurisdiction in preventing the prisoner's escape and (2) claimed differences between the "Great Writ" and writs of habeas corpus ad testificandum.

In Johnston v. Marsh, 227 F.2d 528 (3rd Cir. 1955), a case cited by the respondents in their reply brief but not by the court of appeals, one Ackerman had been convicted of offenses in the state courts of Pennsylvania and was serving his sentence. He sought a writ of habeas corpus in the United States District Court for the western district of Pennsylvania challenging his state court conviction on due process grounds. His petition included a request that he be admitted to bail pending a decision on the merits because he was going blind. The court issued a writ of habeas corpus under 28 U.S.C. § 2241(c)(5).^{11/} After a hearing, the court granted his request conditional upon his remaining in a private hospital. The warden of the state prison brought a petition for a writ of mandamus and prohibition asserting that the judge had exceeded his authority and sought to regain custody of Ackerman.

In refusing to issue the extraordinary writ requested, the court of appeals held that the basis for the judge's authority

^{11/} " § 2241(c) The writ of habeas corpus shall not extend to a prisoner unless --

(5) It is necessary to bring him into court to testify or for trial."

was the fact that Ackerman had been brought before him, and that the federal court had personal and subject matter jurisdiction. In a footnote, the court specifically addressed the issue of custody:

We are not required here to decide whether a court can properly grant bail without first securing custody of the prisoner. On August 12, 1955, Judge Marsh issued a writ of habeas corpus ordering the prisoner brought before him and the prisoner was so brought. The Code, 62 Stat. 965 (1948), as amended, 28 U.S.C. § 2241(c)(5) (1952), gives the court the authority to issue writs "necessary to bring [the prisoner] into court to testify ...," without limitation as to the context of the testimony. When the prisoner came before the court, the Judge, under common law doctrine, gained custody of him, the authority of the writ superseding that of the original commitment. In re Kaine, 1852, 14 How. 103, 133, 55 U.S. 103, 133, 14 L.Ed. 345 (dissent); Barth v. Clise, 1870, 12 Wall. 400, 402, 79 U.S. 400, 402, 20 L.Ed. 393. Johnston v. Marsh, 227 F.2d at 530 n.4.

This analysis admits of no distinctions between writs of habeas corpus ad subjiciendum and ad testificandum and refutes the notion that the interest of the sending jurisdiction that its prisoner not escape is determinative on the question of custody. This decision and the decision of the court of appeals in the instant case are irreconcilable.^{12/}

- B. The court of appeals' ruling that the petitioner was not entitled to a judgment of acquittal because the government failed to establish a prima facie case cannot be squared with other decisions of the federal courts.

The court of appeals indicated that the jury has some role to play in determining where custody lies without defining that role. Because the issue of custody is a factual question for the

^{12/} While Johnston v. Marsh is not an escape case, obviously, the possibility that Ackerman could escape was present. There is no analytically sound basis for applying a different definition in escape and non-escape cases.

jury, and because the government failed to establish a prima facie case in the trial below, petitioner is entitled to a judgment of acquittal. The leading case, erroneously applied by the court of appeals, is United States v. Stead, 528 F.2d 257 (8th Cir. 1975), cert. denied, 425 U.S. 953 (1976).

While serving a sentence in a federal penitentiary in Marion, Illinois, Stead filed a petition for a writ of error coram nobis in the Missouri state courts attacking state court judgments and sentences already served. The state court issued a writ of habeas corpus ad testificandum to the federal marshal and the warden directing them to produce Stead on August 30. The writ stated that "after said proceeding the defendant shall be returned forthwith" to the custody of the marshal and warden. Stead was delivered to the St. Louis County jail and booked as a Federal Prisoner Awaiting Transportation" on August 28, 1974. On August 30, he was taken to the state court by a deputy federal marshal. When the proceedings ended, he was taken back to the jail by the same deputy to await transportation back to Marion. On September 21, 1974, he escaped from the county jail. After he was apprehended, he was charged with escape pursuant to § 751(a).^{13/}

Stead claimed that he was in the custody of the Missouri state officials at the time of his escape. In holding Barth v. Clise, supra, inapposite, the court of appeals stressed that (1) the writ specifically provided that after his testimony he would be returned "forthwith" to federal custody; (2) his testimony in the habeas proceeding had been completed prior to his escape; and (3) he was being held in the federal prisoner section of the county jail when he escaped. The court could not say, in the face of this evidence, that the trier of fact made his decision "on evidence that supported his determination less than beyond a reasonable doubt." 528 F.2d at 258-59. The court further noted that the fact that Stead was booked on the jail records as

^{13/} While the decision does not expressly say so, it seems clear enough that he was tried without a jury.

a "Federal Prisoner Awaiting Transportation" was conclusive evidence that his appearance in the case was completed and he was waiting to be returned to the federal prison.

Not only does Stead make clear that the issue of custody is a question for the trier of fact, but also it shows that the government here failed to establish a prima facie case. No evidence was introduced that petitioner had completed his testimony in the Brad King case; there was no evidence that he was in a "Federal Prisoner Awaiting Transportation" section of the jail from which such an inference could be drawn; the writ of habeas corpus expressly stated that at the conclusion of the proceedings he would be "returned to the custody from whence he came" (emphasis supplied). This is an explicit acknowledgment that there had been a transfer of custody once Bailey had come under the jurisdiction of the Superior Court of the District of Columbia.

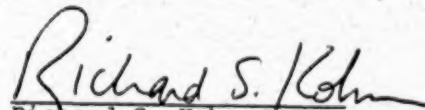
The court of appeals also cites United States v. Viger, 530 F.2d 846 (9th Cir. 1976), and Tucker v. United States, 251 F.2d 794 (9th Cir. 1958) as reaching the same conclusion as in this case. In Viger, the court recognized that Barth v. Clise created a barrier to a finding of federal custody and based his ruling on the fact that the grand jury proceedings to which Viger had been called had been completed at the time of his escape. 530 F.2d at 847. In Tucker, the court adopted the government's position but only after a careful review of the evidence presented by the government that the defendant was, in fact, in federal custody when he escaped. 251 F.2d at 795.

Conclusion

For the reasons stated above, the government's petition raises no issues which merit review by this Court. If, however, the Court grants the government's petition, then it should review

the court of appeals ruling on the custody issue as well.

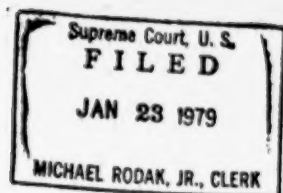
Respectfully submitted,


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In the
SUPREME COURT OF THE UNITED STATES
October Term 1978

No. 78-990

UNITED STATES OF AMERICA

Petitioner

v.

CLIFFORD BAILEY, et al.

Respondents.

UNITED STATES OF AMERICA

Petitioner

v.

JAMES T. COGDELL

Respondent.

On Petition For a Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENT COGDELL

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INTRODUCTION

The two "Questions Presented" in the government's petition for certiorari deal with the substantive law of escape (Pet. 2). In opposition to granting the writ on these questions, respondent^{1/} adopts in full the brief in opposition filed by respondent Walker. Accordingly, this brief does not contain a "reasons for denying the writ" analysis.

The remainder of this brief will address the jurisdictional issues raised in respondent's cross-petition for certiorari (filed December 15, 1978).

OPINION BELOW

The opinion of the court of appeals in respondent's case has been reported at 585 F.2d 1130 (D.C.Cir. 1978).

QUESTION PRESENTED

Whether respondent was subject to federal prosecution under 18 U.S.C. §751(a) for escaping from the D.C. Jail when (1) respondent was at all times a Virginia state prisoner and was not convicted of any District of Columbia or federal offense; (2) respondent was free on bond in the criminal proceeding in which he was under indictment in the Superior Court of the District of Columbia; (3) respondent was in the District of Columbia solely by virtue of a writ of habeas corpus ad prosequendum issued by the

^{1/} For purposes of this brief, the word "respondent" standing alone will refer only to respondent James T. Cogdell. Reference to any other respondent will include the surname, as, for example, "respondent Walker".

Superior Court for a status conference in the District of Columbia criminal proceeding; and (1) the status conference concluded on August 17, 1976 and the escape occurred on August 26, 1976.

STATUTES INVOLVED

1. 18 U.S.C. §751(a)
2. 21 U.S.C. §1651
3. 28 U.S.C. §2241
4. 11 D.C. Code §921(a)(3)(A)(iii) (1973)
5. 16 D.C. Code §1901 (1973)

These statutes are set out in the appendix to this brief with the exception of 18 U.S.C. §751(a), which appears in the government's petition at 2-3.

STATEMENT OF THE CASE

The federal escape statute -- 18 U.S.C. §751(a) -- comprises four separate offenses.^{2/} Respondents Bailey, Cooley and Walker were each indicted for the first of these offenses -- escape from the custody of the Attorney General. In significant contrast, respondent was indicted for the third escape offense -- escape from custody by virtue of process issued under the laws of the United States. Splicing together §751(a) to reflect respondent's situation, he was accused of escaping "from any custody under or by virtue of any process issued under the laws of the

^{2/} They are escape or attempted escape (1) from the custody of the Attorney General; (2) from an institution where the defendant is confined by direction of the Attorney General; (3) from any custody under or by virtue of any process issued under the laws of the United States; and (4) from the custody of an officer or employee of the United States pursuant to lawful arrest.

United States by any court, judge or magistrate . . . if the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense. . . ."^{3/}

The facts of this case must be viewed with the goal of answering the primary question inherent in this statutory language: What custody was respondent in at the time of the escape?

At the time of the escape, respondent was not under conviction for any federal or District of Columbia offense. Although he was under indictment in the District of Columbia, he was free on pretrial bond (Tr. May 6, 1976 at 6). At the time of the escape, respondent had been convicted of a felony in the Circuit Court of Fairfax County, Virginia. On August 17, 1976, respondent was transferred from the Fairfax County Jail where he was incarcerated for sentencing to the Superior Court for a status conference (Pet. 102; 108). The transfer was effected by a writ of habeas corpus ad prosequendum issued by the Criminal Division of the Superior Court (Pet. 108). The writ -- addressed jointly to the Superintendent of the Fairfax County Jail, the United States Marshal for the District of Columbia, and the United States Marshal for the Eastern District of Virginia -- contained two directives. First, respondent was to be produced at the status hearing in Superior Court. Second, at the conclusion of

^{3/} The indictment somewhat altered the statutory language. The federal count of both the original and retyped indictment charged:

"On or about August 26, 1976, within the District of Columbia, James T. Cogdell, having been in the custody under and by virtue of a commitment issued under the laws of the United States by a judge of the Superior Court of the District of Columbia following his arrest on a charge of a felony, did unlawfully and wilfully flee and escape from such custody.
(Violation of Title 18, U.S.Code, Section 751(a))."

the status hearing, respondent was to be returned "to the custody from whence he came" (Govt. Ex. 3).^{4/}

Respondent appeared at the status conference on August 17, 1976. Despite the language of the writ, and despite the bench ruling of the Superior Court judge that appellant was to be "promptly" returned to the Fairfax authorities,^{5/} respondent was

^{4/} The writ contains the Superior Court (Criminal Division) caption and is signed by a judge of the Superior Court. The text provides:

WRIT OF HABEAS CORPUS AD PROSEQUENDUM

THE PRESIDENT OF THE UNITED STATES

TO: Superintendent, Fairfax County Jail
United States Marshal for the District of Columbia
United States Marshal for the Eastern District of Virginia

GREETINGS:

You are hereby commanded to produce the body of JAMES T. COGDELL by you imprisoned and detained as it is said, to either the United States Marshal in and for the District of Columbia or the United States Marshal in and for the Eastern District of Virginia, or one of their authorized deputies, so he may produce the said JAMES T. COGDELL under safe and secure conduct, before the Superior Court of the District of Columbia on August 17, 1976 so that a status hearing may be held in the above captioned case in this Court, and then, upon the conclusion of such proceedings, be returned by either of the aforementioned United States Marshals, or a deputy thereof, to the custody from whence he (she) came and have then and there this writ.
(Govt. Exh. 3)

^{5/} The Superior Court transcript reflects the following colloquy:

THE COURT: Okay. I suppose we have to get a motions hearing date. So when after the 20th would you like to have it? We could have it, say, the 26th at five o'clock. Do we need a writ each time to get Mr. Cogdell here?

MR. STROUD [A.U.S.A.]: We do, Your Honor.

THE COURT: The motion is set for five o'clock on Thursday. The bond in this case has already been set, which the gentleman has made. It will remain. Make sure that we have the writs and so on necessary if he is not in our jurisdiction to have the gentleman here.

(Footnote continued on next page)

taken to the D.C. Jail. He had not been returned to Fairfax by August 26, 1976, the date of the escape.

REASONS FOR GRANTING THE
CONDITIONAL CROSS-PETITION

The issue which respondent proposes to raise by cross-petition is a substantial one. Granting the cross-petition will afford this Court the opportunity to review the entire case and to correct an error of the court of appeals. The relevant circuit court opinions are in a state of confusion and conflict. In view of the frequency with which state prisoners appear in federal courts (and federal prisoners in state courts) pursuant to writs of habeas corpus ad prosequendum or ad testificandum, resolution

(Continuation of footnote from previous page)

MR. SHORTER [Defense Counsel]: Yes. May I request some assistance through the Court concerning Mr. Cogdell? The last time Mr. Cogdell was here, I think for arraignment, the Marshals didn't return him to Fairfax for at least 15 days --

MR. COGDELL: Three weeks.

MR. SHORTER: And Mr. --

THE COURT: I don't even have the writ -- I think he ought to go back promptly. Fairfax isn't that far away.

MR. SHORTER: Mr. Stroud made efforts at my request to have the defendant returned promptly, but the Marshal's office, Your Honor, was just a little slow in doing it. We understood he was going back the same date.

THE COURT: Well, I will ask one of the Marshals assigned to the Court to kind of keep track of it and let me know sometime tomorrow where Mr. Cogdell is in the system. If there is a hangup, I'll get direct feedback tomorrow. So the problem -- hopefully, he will go back today. If not, I will be able to find out tomorrow and perhaps take some remedial action then.

MR. SHORTER: Thank you, Your Honor.

(Tr. Superior Ct. Crim. No. 58609-76 at 34) (emphasis added).

of the cross-petition issue will have an impact well beyond this case.

1. The fact that respondent was incarcerated in the District of Columbia Jail is solely and directly attributable to the fact of his Virginia conviction. Respondent was not incarcerated by virtue of the pendency of the District of Columbia criminal action. Exactly the opposite: that action had produced his release on bond. Indeed, were it not for the Virginia conviction, respondent could have departed the Superior Court status conference on August 17, 1976 without restraint.

The government successfully argued in the court of appeals that respondent was in federal custody because the writ of habeas corpus ad prosequendum was both the source of custody and a form of process under the laws of the United States. (Govt. Br. in Ct.App. at 6-13 and 22; Pet. 104a-107a). This argument is twice flawed. First, it misconstrues the nature of a writ of habeas corpus ad prosequendum. Second, it ascribes the writ-granting authority of the Superior Court to the laws of the United States rather than to the District of Columbia Code.

A writ of habeas corpus ad prosequendum is not an independent source of custody. Rather, it simply acts to conserve the custody of the sending jurisdiction. Strangely, since deciding respondent's case, the court below has recognized precisely this point:

When an accused is transferred pursuant to a writ of habeas corpus ad prosequendum he is considered to be "on loan" to the federal authorities so that the sending state's jurisdiction over the accused continues uninterrupted. Failure to release a prisoner does not alter that "borrowed" status, transforming a state prisoner into a federal prisoner.
Clifton Crawford v. Delbert C. Jackson, U.S.App.D.C. #78-1096, decided November 22, 1978.

Even more strangely, in the companion case of respondents Bailey, Cooley, and Walker, the court below decided that

prisoners transferred by virtue of a writ of habeas corpus ad testificandum^{6/} remain in the custody of the sending jurisdiction by virtue of the original conviction:

In addition to protecting the interest of the sending jurisdiction, holding that prisoners transferred by writs of habeas corpus ad testificandum are still in custody "by virtue of" the original commitment makes intuitive sense. The writ of habeas corpus ad testificandum is necessary only because the prisoner is already in custody elsewhere; the prisoner is kept confined when he is not testifying essentially because of the previous commitment; and any time during which the prisoner is confined under the writ counts toward satisfying the prisoner's original sentence. (Pet. 33a-34a).

Other federal courts have reached by a different route the identical conclusion as to the non-custodial nature of writs of habeas corpus ad prosequendum. These courts label the custody engendered by a writ of habeas corpus ad prosequendum as mere physical custody, which does not support federal jurisdiction under 18 U.S.C. §751(a), and distinguish it from legal custody, which does support such jurisdiction. United States v. Puncsak, 146 F.Supp. 523 (D.Alaska 1956); United States ex rel. Strewl^{7/} v. Warden of Clinton Prison, 21 F.Supp. 502 (N.D.N.Y. 1937).

6/ For purposes of this discussion, there is no need to distinguish between writs of habeas corpus ad prosequendum and writs of habeas corpus ad testificandum.

7/ Petitioner in Strewl was convicted of a federal offense prior to the expiration of his state term of imprisonment. He sought a writ of habeas corpus directing his transfer to federal prison from the state prison on the theory that he was a federal rather than a state prisoner. The federal court rejected his theory, stating:

Even if [the state prisoner] had been turned over to the physical custody of the United States marshal, he would nevertheless still be in custody of the state courts in contemplation of law. The state authorities have no right to surrender custody of a state prisoner. If they should actually do so, it would not be a surrender of the legal custody of the prisoner, for under the law he still remains a state prisoner.

(Footnote continued on next page)

Proof of the fact that respondent was in custody by virtue of the Virginia conviction rather than by virtue of the writ of habeas corpus ad prosequendum is demonstrated not only by the cases cited above but by two additional facts. First, as noted by the court of appeals in its decision in the companion cases, the time spent in the requesting jurisdiction under a writ of habeas corpus ad testificandum (and, presumably, a writ of habeas corpus ad prosequendum) is counted toward service of the sentence imposed by the sending jurisdiction (Pet. 34a). Second, had respondent sought a writ of habeas corpus attacking his confinement in the D.C. Jail, the writ could have been directed only to the Fairfax County jailor. Pelley v. Matthews, 82 U.S. App.D.C. 264, 163 F.2d 700 (1947), cert. denied 332 U.S. 811.

In summary, respondent was in custody on August 26, 1976, but he was not in custody by virtue of the Superior Court writ of habeas corpus ad prosequendum. For purposes of the "custody under or by virtue of" language of the statute and indictment,^{8/} respondent was in custody under and/or by virtue of the Virginia conviction.

Respondent submits that this analysis, by itself, compels the conclusion that the district court lacked jurisdiction over respondent's escape. In addition, there are two "even if"

(Continuation of footnote from previous page)

This court recognized the superior right of the state court to the [state prisoner's] custody, for its writ of habeas corpus ad prosequendum provided that upon completion of the trial, he should be returned to the respondent and the state prison in which he was confined under mandate of the state court.

(Strewl v. Warden of Clinton Prison, supra, 21 F.Supp. at 504).

^{8/} The indictment substitutes "and" for the statutory "or" in this phrase.

arguments which fortify this conclusion. First, even if respondent had been in custody by virtue of the writ of habeas corpus ad prosequendum during the transfer from Fairfax to the District of Columbia, that custody expired at the conclusion of the August 17, 1976 status call necessitating the writ. The conclusion of that proceeding effected a remand to the custody of the sending authority. United States v. Viger, 530 F.2d 846 (9th Cir. 1976); United States v. Stead, 528 F.2d 257 (8th Cir. 1975) cert. denied 425 U.S. 953 (1976).

Second, even if respondent were in custody on August 26, 1976 by virtue of the writ of habeas corpus ad prosequendum, there is a very serious question whether that writ qualifies as process "issued under the laws of the United States" as the statute and indictment require. The court of appeals accepted the government's argument that the writ was issued under the All Writs Act, 28 U.S.C. §1651 and was therefore issued under the laws of the United States (Pet. 104a-107a). Respondent's position is that such a holding is unwarranted in light of the District of Columbia Court Reform and Criminal Procedure Act of 1970 (Pub.L.No. 91-358, 84 STAT. 473) (the "Court Reform Act").

Carbo v. United States, 364 U.S. 611 (1961) contains an exhaustive history of all congressional legislation dealing generally with the writ of habeas corpus and specifically with the writ of habeas corpus ad prosequendum. To briefly summarize that history, §14 of the First Judiciary Act (1789) conferred authority on "all the . . . courts of the United States . . . to issue writs of scire facias, habeas corpus, and all other writs not specifically provided for by statute" Carbo at 614. Upon revision of the federal statutes in 1874, the general power of the federal courts to issue writs of habeas corpus was removed from

the language of the then-existing statute derivative from the all writs portion of §14 of the First Judiciary Act and was reinserted in three reorganized sections of the Revised Statutes dealing specifically with habeas corpus. Carbo at 615-616. These three reorganized sections of the Revised Statutes were recodified in 1948 as the three subsections of 28 U.S.C. §2241 and "for the first time in the legislative history of the writ of habeas corpus there was made explicit reference to the writ ad prosequendum in statute." Carbo at 619.

Thus, since 1874, Congress had maintained two separate lines of writ-granting authority; one (now 28 U.S.C. §2241) relating specifically to the generic writ of habeas corpus (including the ad prosequendum species) and a second (now 28 U.S.C. §1651) relating to all other writs "agreeable to the usages and principles of law".

The Superior Court is empowered to grant writs under §1651 but not under §2241.^{9/} The question respondent raises is whether the Superior Court's writ-granting authority under §1651 includes the authority to issue writs of habeas corpus ad prosequendum. The court of appeals answered this question affirmatively, relying on United States v. Hayman, 342 U.S. 205 (1952), Price v. Johnson, 334 U.S. 226 (1948), and an enigmatic reference to Moore's Federal Practice. (Pet. 106a).^{10/} Respondent submits

9/ This is because the writ-granting authority conferred by Congress in §1651 extends to "the Supreme Court and all courts established by Act of Congress", thereby including the Superior Court of the District of Columbia, whereas the writ-granting authority conferred by §2241 extends only to "the Supreme Court, and a justice thereof, the district courts and any circuit judge within their respective jurisdictions", thereby excluding the Superior Court of the District of Columbia.

10/ The holding of the court of appeals on this question has been followed by the District of Columbia Court of Appeals in United States v. Palmer, 393 A.2d 143 (1978).

that the court of appeals has misinterpreted the law in this area. In Carbo, supra, 364 U.S. at 621 and n.21, the Court characterized the very cases on which the court of appeals relied as cases "in which habeas corpus was not even involved."^{11/} Moreover, the holding of the court of appeals creates the anomalous situation that the Superior Court -- and only the Superior Court -- may issue writs of habeas corpus ad prosequendum under the All Writs Act. This occurs because the All Writs Act is clearly inapplicable to state courts, and, as noted earlier, federal courts issue all writs of habeas corpus pursuant to 28 U.S.C. §2241.

This anomaly is all the more peculiar in view of the habeas corpus authority conferred on the Superior Court by the Court Reform Act. Specifically, the Court Reform Act accorded the Superior Court jurisdiction "relating to writs of habeas corpus directed to persons other than federal officers and employees". 11 D.C.Code 921(a)(3)(A)(iii). This authority was codified in new subsection (c) of 16 D.C.Code §1901.^{12/} Although §1901 refers generally to writs of habeas corpus and not specifically to writs of habeas corpus ad prosequendum, the generic language necessarily includes the ad prosequendum writ as well as the Great Writ. Ex parte Bollman, 4 Cranch 75, 2 L.Ed. 544 (1807) (per Chief Justice Marshall).

^{11/} To the same effect is the dissent in Carbo at 364 U.S. 624 n.2.

^{12/} Subsections (b) and (c) of 16 D.C.Code §1901 were part of the Court Reform Act and provide:

(b) Petitions for writs directed to Federal officers and employees shall be filed in the United States District Court for the District of Columbia.

(c) Petitions for writs directed to any other person shall be filed in the Superior Court of the District of Columbia.

The purpose of the Court Reform Act was to disentangle the state and federal judicial systems in the District of Columbia, thereby making the Superior Court more nearly comparable to a state court. To hold that the authority of the Superior Court to issue writs of habeas corpus ad prosequendum derives from the All Writs Act rather than from the D.C. Code defeats this purpose by needlessly conferring federal-based power on the Superior Court.

2. The question whether a prisoner transferred from one jurisdiction to another pursuant to a writ of habeas corpus ad prosequendum may be prosecuted for escape by the sending or receiving jurisdiction has engendered confusion among the courts of appeals. This results from a failure to identify which one of the four offenses defined by §751(a) is the basis for the prosecution and from a failure to identify whether the escape occurred before or after the conclusion of the legal proceeding necessitating the writ. United States v. Hall, 451 F.2d 347 (4th Cir. 1971) (three paragraph opinion affirming conviction under 18 U.S.C. §751(a): no indication of whether escape preceded court appearance); United States v. Farley, 424 F.2d 255 (4th Cir. 1970) (two paragraph opinion affirming conviction under 18 U.S.C. §751(a) without reference to specific escape offense; escape occurred during process of transporting prisoner to requesting jurisdiction and in advance of court appearance).

The decision by the court of appeals in respondent's case is inconsistent with its decision in the case of respondents Bailey, Cooley and Walker and with its decision in Clifton Crawford v. Delbert C. Jackson, *supra*. Moreover, the decision is inconsistent with the decision of the Eighth Circuit written by Justice Clark (sitting by designation) in United States v. Stead, 528 F.2d 257 (1975), *cert. denied* 425 U.S. 953 (1976). The fact situation in Stead is the mirror image of this case. Stead was a

federal prisoner at Marion, Illinois. He appeared in the Circuit Court of St. Louis County pursuant to its writ of habeas corpus ad testificandum. At the close of that proceeding, he was returned to the St. Louis County jail to await transportation back to Marion. Three weeks later he escaped from the St. Louis jail. The Eighth Circuit held that, at the time of the escape, Stead was in federal custody and not in the custody of the Missouri state officials:

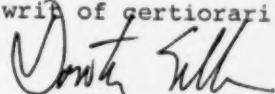
The mere fact that Stead was in the county jail when he escaped is of no consequence. The custody of the county jail was simply that of the federal officers under the circumstances here.
United States v. Stead, *supra*, 528 F.2d at 258.

Mr. Justice Clark's reasoning in Stead controls this case: If Stead -- a convicted federal prisoner who escaped from the jail in which he was held pursuant to the writ -- was in federal custody at the time of the escape, then respondent -- a convicted state prisoner who escaped from the jail in which he was held pursuant to a writ -- was in state custody and not in federal custody at the time of the escape.

Stead also confirms respondent's theory that the delay in returning respondent to Fairfax terminated whatever custodial effect may be attributed to the writ of habeas corpus ad prosequendum. The writ in Stead provided that "after the [state court] proceeding, the defendant shall be returned forthwith" to the custody of the federal marshal and warden. That is the functional equivalent of the language of the writ in this case (and the language of the Superior Court judge on August 17, 1976). Stead holds that the completion of the court proceeding necessitating the writ -- without regard to whether the return trip is completed -- effects a remand to the legal custody of the sending authority. That portion of Stead is likewise inconsistent with the holding of the court of appeals in respondent's case.

CONCLUSION

For the reasons set forth in the brief in opposition of respondent Walker, respondent requests the court to deny the government's petition for a writ of certiorari. If, however, the court grants the government's petition, it should also grant respondent's cross-petition for a writ of certiorari.



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January 23, 1979

CERTIFICATE OF SERVICE

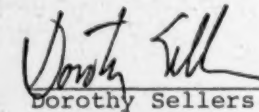
I hereby certify that on January 23, 1979, a copy of respondent Cogdell's brief in opposition was mailed, first class mail, postage prepaid to

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§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

As amended May 24, 1949, c. 139, § 90, 63 Stat. 102.

§ 1652. State laws as rules of decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

§ 1653. Amendment of pleadings to show jurisdiction

Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

CHAPTER 153—HABEAS CORPUS

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- 2243. Issuance of writ; return; hearing; decision.
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§ 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

- (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
- (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
- (3) He is in custody in violation of the Constitution or laws or treaties of the United States; or
- (4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination. As amended May 24, 1949, c. 139, § 112, 63 Stat. 105; Sept. 19, 1966, Pub.L. 89-590, 80 Stat. 811.

§ 2242. Application

Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.

It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known.

It may be amended or supplemented as provided in the rules of procedure applicable to civil actions.

If addressed to the Supreme Court, a justice thereof or a circuit judge it shall state the reasons for not making application to the district court of the district in which the applicant is held.

§ 2243. Issuance of writ; return; hearing; decision

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

used at subsequent trial for impeachment purposes. *Neely v. United States* (1944, 144 F. 2d 519, 79 U.S. App. D.C. 177, certiorari denied 65 S. Ct. 83, 323 U.S. 754, 89 L. Ed. 604).

Fees of witnesses and jurors

When witnesses and jurors are summoned by a lawful officer they are compelled to obey the writ and are entitled to their fees, advanced by the coroner, even though the inquest was unlawful. *Levy Court v. Woodward* (1864, 69 U.S. 501, 3 Wall. 501, 17 L. Ed. 431).

Judge pro tem

Judge pro tem was not disqualified from passing sentence because regular judge returned between time of trial and date set for sentencing. *Shore v. Splain* (1919, 258 F. 150, 49 App. D.C. 6).

Power to take testimony

A coroner may take testimony of probable defendants if it is given voluntarily after advice as to their rights and, in so doing, coroner does not act as a prosecuting officer, but sits in a quasi-judicial capacity. *Neely v. United States* (1944, 144 F. 2d 519, 79 U.S. App. D.C. 177, certiorari denied 65 S. Ct. 83, 323 U.S. 754, 89 L. Ed. 604).

Reduction of sentence

Municipal Court of District of Columbia had power to reduce sentences during term at which they were imposed. *Peden v. Fleming* (1946, 153 F. 2d 800, 51 U.S. App. D.C. 2).

Where Municipal Court of District of Columbia imposing sentence in August, 1942, directed that its term then current be kept open, the court could not extend the August, 1942, term until September 3, 1943, and could not at that time reduce sentences imposed more than a year before. *Id.*

Where order of probation was void because entered after defendant had been committed, release of defendant under the probation order was premature and it was duty of court to cause him to be recommitted, and the void probation order did not amount to an unconditional reduction of sentence. *Id.*

§ 11-907. Absence, disability, or disqualification of chief judge

(a) When the chief judge of the court is absent or disabled, his duties shall devolve upon and be performed by such associate judge as the chief judge may designate in writing. In the event that the chief judge is (1) disqualified or suspended, or (2) unable or fails to make such a designation, his duties shall devolve upon and be performed by the associate judges of the court according to the seniority of their original commissions.

(b) A chief judge whose term as chief judge has expired shall continue to serve until redesignated or until his successor has been designated. When there is a vacancy in the position of chief judge, the position shall be filled temporarily as provided in subsection (a). (July 29, 1970, Pub. L. 91-358, § 111, title I, 84 Stat. 483.)

§ 11-908. Designation and assignment of judges

(a) The chief judge may designate the number of judges to serve in any division and branch of the Superior Court and may assign and reassign any judge to sit in any division or branch. When making assignments to the Family Division and Tax Division, the chief judge shall consider the qualifications and interest of the judges. Each associate judge shall attend and serve in the division and branch to which he is assigned.

(b) When the business of the Superior Court requires, the chief judge may certify to the chief judge of the District of Columbia Court of Appeals the need for temporary assignment of an additional judge or judges as provided in section 11-707.

(c) Upon presentation of a certificate of necessity by the chief judge of the Superior Court, the chief judge of the United States Court of Appeals for the District of Columbia Circuit may designate and assign temporarily a judge or judges as provided in subsection (c) of section 292 of title 28, United States Code. (July 29, 1970, Pub. L. 91-358, § 111, title I, 84 Stat. 483.)

SECTION REFERRED TO IN U.S. CODE

This section is referred to in title 28, section 292, U.S. Code.

§ 11-909. Meetings and reports

(a) The judges of the Superior Court shall meet upon the call of the chief judge, but not less than once each month, to consider matters relating to the business and operations of the court. The court may by rule require additional meetings.

(b) Each associate judge shall submit to the chief judge such reports and data as the chief judge may request. Each judge shall submit a monthly written report to the chief judge and the Commission on Judicial Disabilities and Tenure which shall be in a form prescribed by the chief judge after consultation with the Commission and which shall set forth the duties performed by the reporting judge as follows:

- (1) The number of days' attendance in court of the judge during the month covered.
- (2) The division and branch (if any) of the court which he attended.
- (3) The number of hours per day of his attendance.
- (4) The number and type of matters disposed of by the judge during the months covered.
- (5) Such other data as the chief judge may require. (July 29, 1970, Pub. L. 91-358, § 111, title I, 84 Stat. 483.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 11-1730.

§ 11-910. Clerks and secretaries for judges

Each judge of the Superior Court may appoint and remove a personal law clerk and a personal secretary. (July 29, 1970, Pub. L. 91-358, § 111, title I, 84 Stat. 484.)

SUBCHAPTER II.—JURISDICTION

§ 11-921. Civil jurisdiction

(a) Except as provided in subsection (b), the Superior Court has jurisdiction of any civil action or other matter (at law or in equity) brought in the District of Columbia. Such jurisdiction shall vest in the court as follows:

(1) Beginning on the effective date of the District of Columbia Court Reorganization Act of 1970, the court has jurisdiction of any civil action or other matter begun before such effective date in the District of Columbia Court of General Sessions, the Juvenile Court of the District of Columbia, or the District of Columbia Tax Court.

(2) Beginning on such effective date, the court has jurisdiction of any civil action or other matter, at law or in equity, which is begun in the Superior Court on or after such effective date and in which the amount in controversy does not exceed \$50,000.

(3) Beginning on such effective date, the court has jurisdiction (regardless of the amount in controversy) of any civil action or other matter, at law or in equity, which—

- (A) is brought under—
 - (i) subchapter I of chapter 11 of title 16 (relating to ejectment);
 - (ii) subchapter II or III of chapter 13 of title 16 (relating to the condemnation of land on behalf of the District of Columbia);
 - (iii) chapter 19 of title 16 (relating to writs of habeas corpus directed to persons other than Federal officers and employees);
 - (iv) chapter 25 of title 16 (relating to change of name);
 - (v) chapter 33 of title 16 (relating to quieting title to real property);
 - (vi) subchapter II of chapter 35 of title 16 (relating to writ of quo warranto);
 - (vii) chapter 37 of title 16 (relating to replevin of personal property);
 - (viii) the Hospital Treatment for Drug Addicts Act for the District of Columbia (D.C. Code, secs. 24-601 through 24-611) (relating to commitment of narcotics users); or
 - (ix) section 2 of the Act of August 3, 1968 (D.C. Code, sec. 1-804b) (relating to contractors bonds).

(B) involves an appeal from or petition for review of any assessment of tax (or civil penalty thereon) made by the District of Columbia; or

(C) is brought under chapter 23 of title 16.

(4) Immediately following the expiration of the eighteen-month period beginning on such effective date, the court has jurisdiction (regardless of the amount in controversy) of any civil action or other matter, at law or in equity, brought under—

- (A) chapter 3 of title 21 (relating to gifts to minors);
- (B) chapter 5 of title 21 (relating to hospitalization of the mentally ill);
- (C) chapter 7 of title 21 (relating to property of the mentally ill);
- (D) chapter 11 of title 21 (relating to commitment and maintenance of substantially retarded persons);
- (E) chapter 13 of title 21 (relating to appointment of committees for alcoholics and addicts);
- (F) chapter 15 of title 21 (relating to appointment of conservators); or

(G) chapter 3, 7, 11, 13, or 15 of title 21 in the United States District Court for the District of Columbia and not completed in that court before the expiration of such eighteen-month period.

(5) Immediately following the expiration of the thirty-month period beginning on such effective date, the court has jurisdiction (regardless of the amount in controversy)—

- (A) of any matter (at law or in equity)—
 - (i) brought under chapter 29 of title 16 (relating to partition of property and assignment of dower);
 - (ii) which would have been within the jurisdiction of the Orphans Court of Wash-

ington County, District of Columbia before June 21, 1870;

(iii) relating to the execution or validity of wills devising real property within the District of Columbia, and of wills and testaments properly presented for probate in the court, and the admission to probate and recording of those wills;

(iv) relating to the proof of wills of either personal or real property and the revocation of probate of wills for cause;

(v) involving the granting and revocation for cause of letters testamentary, letters of administration, letters ad colligendum and letters of guardianship, and the appointment of successors to persons whose letters have been revoked;

(vi) involving the hearing, examination, and issuance of decrees upon accounts, claims, and demands existing between executors or administrators and legatees or persons entitled to a distributive share of an intestate estate, or between wards and their guardians;

(vii) involving the enforcement of the rendition of inventories and accounts by executors, administrators, collectors, guardians, and trustees required to account to the court;

(viii) involving the enforcement of distribution of estates by executors and administrators and the payment or delivery by guardians of money or property belonging to their wards; or

(ix) otherwise within the probate jurisdiction of the United States District Court for the District of Columbia on the day before such effective date; and

(B) any matter (at law or in equity) described in subparagraph (A) which was begun in the United States District Court for the District of Columbia and not completed in that court before the expiration of such thirty-month period.

(6) Immediately following the expiration of the thirty-month period beginning on such effective date, the court has jurisdiction (regardless of the amount in controversy) of any civil action or other matter, at law or in equity, brought in the District of Columbia.

(b) The Superior Court does not have jurisdiction over any civil action or other matter (1) over which exclusive jurisdiction is vested in a Federal court in the District of Columbia, or (2) over which jurisdiction is vested in the United States District Court for the District of Columbia under section 11-501 (relating to civil actions or other matters begun in such court before the expiration of the thirty-month period beginning on the effective date of the District of Columbia Court Reorganization Act of 1970). (July 29, 1970, Pub. L. 91-358, § 111, title I, 84 Stat. 484; Dec. 7, 1970, Pub. L. 91-530, § 2(a)(1), 84 Stat. 1390.)

REFERENCE IN TEXT

For the effective date of the District of Columbia Court Reorganization Act of 1970, referred to in text, see notes preceding § 11-101.

other valuable thing, so lost and paid or delivered, or any part thereof, or the full value thereof, by a civil action, from the winner thereof, with costs. If the person who loses the money or other thing, does not, within three months actually and bona fide, and without collusion, sue, and with effect prosecute, therefor, any person may sue for, and recover treble the value of the money, goods, chattels, and other things, with costs of suit, by a civil action against the winner, one-half to the use of the plaintiff, the remainder to the use of the District of Columbia. (Dec. 23, 1963, 77 Stat. 582, Pub. L. 88-241, § 1, eff. Jan. 1, 1964.)

REVISION NOTES

Based on D.C. Code, 1961 ed., § 16-702 (9 Ann. ch. 14, § 2, 1710; Kilty's Rept., p. 248; Alex. Brit. Stat., p. 690; Md. Act 1781, ch. 16, § 1; Comp. Stat. D.C., p. 244, § 13; R.S. D.C., § 837; Md. Act 1777, ch. 6, § 1).

The amount of "twenty-six dollars and sixty-seven cents" is rounded to the amount of \$25, which is the approximate American equivalent of the British sum specified by the original statute.

The term "civil action" is substituted for "action of debt" to conform with rule 2 of the Federal Rules of Civil Procedure and of the civil rules of the Court of General Sessions; and words "in which actions or suits no more than one imparlance shall be allowed; in which actions it shall be sufficient for the plaintiff to allege, that the defendant or defendants are indebted to the plaintiffs, or received to the plaintiff's use, the monies so lost and paid, or converted the goods won by the plaintiff's to the defendant's use, whereby the plaintiff's action accrued to him, according to the form of this section, without setting forth the special matter" are omitted as covered or superseded by, or inconsistent with, rules of pleading as set forth in rules of court. See, particularly, rules 7-9 of the Federal Rules of Civil Procedure, and of the civil rules of the Court of General Sessions, and rule 4 of the small claims rule of Court of General Sessions.

The provision that the action may "be prosecuted in any court of record" is omitted as inconsistent with provisions governing civil jurisdiction of the District Court and the Court of General Sessions. See sections 11-521 (a) (1), 11-961, and 11-1341 herein.

Changes are made in phraseology.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 16-1703, 16-1704.

§ 16-1703. Relief from further penalty upon discovery and repayment of losses

Upon the discovery and repayment of the money or other thing to be discovered and repaid as provided by section 16-1703, the person who so discovers and repays shall be acquitted, indemnified, and discharged from any further or other punishment, forfeiture, or penalty, that he may have incurred by the playing for, or winning, the money or other thing so discovered and repaid. (Dec. 23, 1963, 77 Stat. 583, Pub. L. 88-241, § 1, eff. Jan. 1, 1964.)

REVISION NOTES

Based on D.C. Code, 1961 ed., § 16-703 (9 Ann. ch. 14, § 4, 1710; Kilty's Rept., p. 248; Alex. Brit. Stat., p. 691; Comp. Stat. D.C., p. 244, § 15).

Minor changes are made in phraseology.

§ 16-1704. Cheating at gambling

Whoever, at any one time or sitting, by fraud or false pretense, while playing any game, or while having a share in a wager played for, or while betting on the sides or hands of persons who play, wins, or acquires to himself or to any other person, above the sum or value of \$25, shall, upon conviction of the

offense, forfeit five times the value of the sum of money or other thing so won, and shall be deemed infamous.

The penalty prescribed by this section may be recovered in a civil action by the persons specified by, and in the manner provided by, section 16-1702. (Dec. 23, 1963, 77 Stat. 583, Pub. L. 88-241, § 1, eff. Jan. 1, 1964.)

REVISION NOTES

Based on D.C. Code, 1961 ed., § 16-704 (9 Ann. ch. 14, § 5, 1710; Kilty's Rept., p. 248; Alex. Brit. Stat., p. 691; Md. Act 1780, ch. 23, § 3; Md. Act 1781, ch. 16, § 1; Comp. Stat. D.C., p. 245, § 16).

Surplusage is omitted, and changes are made in phraseology.

Chapter 19.—HABEAS CORPUS

Sec.

16-1901. Petition; issuance of writ.

16-1902. Service of writ; return.

16-1903. Suspected evasion or disobedience of writ; procedure.

16-1904. Forfeiture and penalty for failure to produce.

16-1905. Right to copy of commitment; forfeiture.

16-1906. Inquiry into cause of detention; bail; bond.

16-1907. Traversing return; pleading; witnesses.

16-1908. Right of other persons to writ.

16-1909. Construction of chapter.

AMENDMENT

1970—Section 145(h)(2) of Act July 29, 1970, Public Law 91-358 amended analysis relating to item 16-1901 to read as above set out.

EFFECTIVE DATE OF 1970 AMENDMENT

See note preceding section 11-101.

CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in section 11-521.

§ 16-1901. Petition; issuance of writ

(a) A person committed, detained, confined, or restrained from his lawful liberty within the District, under any color or pretense whatever, or a person in his behalf, may apply by petition to the appropriate court, or a judge thereof, for a writ of habeas corpus, to the end that the cause of the commitment, detainer, confinement, or restraint may be inquired into. The court or the judge applied to, if the facts set forth in the petition make a prima facie case, shall forthwith grant the writ, directed to the officer or other person in whose custody or keeping the party so detained is returnable forthwith before the court or judge.

(b) Petitions for writs directed to Federal officers and employees shall be filed in the United States District Court for the District of Columbia.

(c) Petitions for writs directed to any other person shall be filed in the Superior Court of the District of Columbia. (Dec. 23, 1963, 77 Stat. 583, Pub. L. 88-241, § 1, eff. Jan. 1, 1964; July 29, 1970, Pub. L. 91-358, title I, § 145(h)(1); 84 Stat. 560.)

AMENDMENT

1970—Section 145(h)(1) of Act July 29, 1970, Public Law 91-358 amended section—

(A) by striking out "the United States District Court for the District of Columbia" in the first sentence and inserting in lieu thereof "the appropriate court";

(B) by inserting "(a)" immediately before "A person" and by adding after and below the last sentence new subsections (b) and (c) to read as above set out; and

(C) by striking out "to District Court" in the section heading.

No. 78-990

Supreme Court, U. S.

FILED

JUN 16 1979

MICHAEL ROBAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

CLIFFORD BAILEY, ET AL.

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES T. COGDELL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-91a, 100a-113a) are reported at 585 F.2d 1087 and 585 F.2d 1130.

(1)

JURISDICTION

The judgments of the court of appeals (Pet. App. 93a-94a, 114a-115a) were entered on July 12, 1978, and petitions for rehearing were denied on October 19, 1978 (Pet. App. 97a, 116a). On November 13, 1978, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 18, 1978. The petition was filed on that date and was granted on March 19, 1979. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the federal escape statute, 18 U.S.C. 751(a), requires proof of a defendant's specific intent to avoid "normal aspects of 'confinement'".

2. Whether duress may be raised as a defense in an escape prosecution where the defendant (a) was not threatened with imminent harm from harsh prison conditions at the time of the escape and (b) remained in hiding following the escape.

STATUTE INVOLVED

18 U.S.C. 751(a) provides:

Whoever escapes or attempts to escape from the custody of the Attorney General or his authorized representative, or from any institution or facility in which he is confined by direction of the Attorney General, or from any custody under or by virtue of any process issued under the laws of the United States by any court, judge, or

magistrate, or from the custody of an officer or employee of the United States pursuant to lawful arrest, shall, if the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense, be fined not more than \$5,000 or imprisoned not more than five years, or both; or if the custody or confinement is for extradition or by virtue of an arrest or charge of or for a misdemeanor, and prior to conviction, be fined not more than \$1,000 or imprisoned not more than one year, or both.

STATEMENT

A. Respondents Bailey, *et al.*

Following a jury trial in the United States District Court for the District of Columbia, respondents Clifford Bailey, Ronald Cooley, and Ralph Walker were convicted of escaping from the custody of the Attorney General, in violation of 18 U.S.C. 751(a).¹ Each was sentenced to five years' imprisonment, to be served consecutively to sentences previously imposed.²

¹ Respondents were also charged with "prison breach," in violation of 22 D.C. Code 2601 (1973). The jury was instructed not to consider the charge under the D.C. Code if it found respondents guilty under the federal escape statute (App. 224; Tr. 804).

² Respondent Bailey was serving a 23-year sentence for bank robbery and attempted escape. Respondent Walker was serving a 15-year sentence for bank robbery. They had been brought from other federal prisons to the District of Columbia Jail pursuant to writs of habeas corpus ad testificandum issued by the Superior Court of the District of

The evidence showed that in the early morning hours of August 26, 1976, respondents Bailey, Cooley, and Walker escaped from the New Detention Center of the District of Columbia Jail by climbing through a low-level window of the Northeast-1 housing unit (App. 168; Tr. 562). They were apprehended by FBI agents in the District of Columbia on November 19, September 27, and December 13, 1976, respectively (App. 27-28; Tr. 65-66).

Respondents did not dispute at trial that they had fled from the jail without permission and had remained in hiding until their capture (App. 126-127, 169, 199-200; Tr. 418-419, 564, 721-722).³ Rather, they claimed that their escape was excusable because of intolerable conditions at the jail. In support of this contention, respondents produced testimony from other jail inmates that fires were frequently set in the Northeast-1 cellblock, that correctional officers occasionally permitted these fires to burn, and that the resulting smoke often made breathing difficult for several hours (App. 33-35, 41-42, 55-56, 87-88,

Columbia. Respondent Cooley was serving a five-year sentence in the District of Columbia Jail following his conviction for unlawful possession of an unregistered firearm (Tr. 13-17, Gov't Exhs. 1, 1-A, 1-B, 2, 2-A, 3, 3-A, 4, 5, 6).

³ Respondent Bailey initially testified that he could not remember the details of his escape, claiming that he had "just blacked out" (App. 165-166; Tr. 550). He later admitted that this testimony was not truthful and that he had knowingly escaped by going through an open window of a jail cell and climbing down some bed sheets hanging out of the window (App. 167-168; Tr. 555-562).

99-101, 107-108; Tr. 150-152, 161-163, 203-206, 354, 377-379, 390). The cellblock watch log established that fires had occurred on August 10, 11 and 16, 1976 (Deft. Exh. 1; App. 76-78; Tr. 310-312).⁴ In addition, respondents elicited testimony that, several weeks prior to the escape, Bailey and Cooley were assaulted by guards armed with blackjacks, that corrections officials threatened Cooley as a result of his participation in setting cellblock fires, and that, sometime in early August, guards threatened to kill Bailey if he testified in the case in which he had been subpoenaed as a witness (App. 36-37, 91-95, 97-98, 101-103, 106-107, 109-110, 116-117, 142; Tr. 154, 360-370, 373-375, 380, 382, 388-389, 393, 404, 469).⁵ Respondent Walker also sought to demonstrate that he had received inadequate medical treatment for an alleged epileptic condition (see, *e.g.*, App. 133-140, 182-183, 184-185, 187-188, 190-191; Tr. 438-458, 603-

⁴ The Assistant Administrator of Operations at the jail acknowledged that the prisoners set small fires in the cellblocks. He maintained, however, that the officers on duty promptly extinguished the fires, that exhaust fans were utilized to clear the smoke from the air, and that medical attention was provided to anyone in need of it (App. 56, 58, 61; Tr. 204, 206, 209, 235-236). A corrections officer who had been stationed in Northeast-1 during the summer of 1976 also testified that the fires only lasted from five to seven minutes and that no officer ever permitted a fire to burn without acting to extinguish it (App. 87-92; Tr. 354-363).

⁵ Corrections officers testified that none of the respondents had reported the alleged assaults and threats and denied that the incidents had ever taken place (App. 65-66, 67, 70-71, 87-88, 206, 209; Tr. 246, 255, 273, 354-355, 741, 752).

604, 625, 650-652, 678-680).⁶ Finally, respondent Cooley testified that, on the morning of the escape, respondents Bailey and Walker had threatened to kill him if he did not join them. He admitted, however, that he left the jail by himself and did not know at the time whether Bailey and Walker had also escaped (App. 115-116, 118, 130-131; Tr. 402, 406, 424-425).

Respondents asserted that they took steps to communicate with police authorities following their escape. Respondent Cooley testified that his family attempted unsuccessfully to contact the authorities but that he refrained from doing so personally because he did not know whom to call and feared the repercussions of his escape (App. 118-120, 130-132; Tr. 407-408, 425-426). Respondent Bailey claimed that he "had the police called" and "had the jail officials called several times," although he did not identify the caller and admitted that he himself had not placed any calls or made any other effort to surrender (App. 168-169; Tr. 563-564). Respondent Walker testified that he "kept a constant rapport with the FBI" and tried to negotiate terms for his surrender (App. 194-195, 196-197; Tr. 710-711, 715-716). Walker contended that two days after his departure, he contacted the FBI agent in charge of the escape investigation, described the severity of the

⁶ The evidence presented to support this claim was a medical history provided by respondent Walker himself. The claimed epileptic condition was not confirmed by medical examination. Despite this lack of substantiation, a jail physician had prescribed medication on a trial basis to control the alleged seizures (App. 133-134, 191; Tr. 438-439, 680-681).

conditions in the District of Columbia Jail, and sought to arrange for his detention in another facility (App. 196-198; Tr. 715-716, 718). Approximately 10 days later, he again allegedly telephoned the agent and sought to "work out the conditions for which I wanted to turn myself in." These conditions included an assurance that he would not be injured by the FBI and that he would not be returned to the District of Columbia Jail (App. 198; Tr. 719). According to respondent Walker, the agent promised that respondent would not be harmed but refused to agree that he would not be returned to the jail (App. 200; Tr. 722). A third alleged telephone call resulted in a similar impasse (App. 198-199; Tr. 719-720).⁷

At the close of the evidence, respondents requested an instruction on the defense of duress on the theory that their escape was compelled by the allegedly intolerable jail conditions (App. 17; see Pet. App. 18a n.32). The trial judge denied the request, holding that the defense was unavailable because respondents had failed to surrender to lawful authorities following their escapes (App. 201, 218-219; Tr. 725, 777). The judge instructed the jury as follows (App. 224-225; Tr. 806):

You are instructed as a matter of law that conditions at the District of Columbia Jail or the new detention center, no matter how burdensome

⁷ The FBI agents in charge of the escape investigation testified that they had never received or heard about any telephone calls from respondent Walker during the three months that he was a fugitive (App. 202-203; Tr. 730-733).

or restrictive an individual inmate may find them to be, are not a defense to the charges in this case, nor justification for the commission of the offense of escape.

The court elaborated on this theme later in the charge (App. 225; Tr. 806-807):

Now, the Court permitted the defendants to introduce this evidence and to seek to show that following their escape they turned themselves in, for if one, after escaping has turned himself in, then the defense of coercion or duress may be brought to the attention of the jury as a defense, but only if a defendant turns himself in.

Now, there are recognized procedures for this to be done, and requisite protections insured by such action. As the Court heard the evidence, that was not done in this case. So the Court felt that it was incumbent upon the Court to assume responsibility for this aspect of the case, and to take it out of the case in effect. So, you are not to consider the defense of duress or coercion for the reasons stated. The defendants did not turn themselves in.

The judge also instructed the jury that escape is a "general intent" offense and that a general intent is only "the purpose to do something, the will to do the act. It means the act was done consciously and not inadvertently or accidentally" (App. 223-224; Tr. 803).

B. Respondent Cogdell

Respondent James Cogdell was indicted with the other respondents for the same escape at the District

of Columbia Jail. His case was severed, however, and he was tried before a separate jury. Respondent was convicted of escape, in violation of 18 U.S.C. 751(a), and was sentenced to five years' imprisonment, subject to the immediate parole eligibility provisions of 18 U.S.C. 4205(b)(2) (Cogdell Tr. of July 6, 1977, at 31).

The evidence showed that respondent Cogdell escaped from the District of Columbia Jail on August 26, 1976, and was apprehended on September 28, 1976, while hiding under a pile of clothes in the closet of a residence in Hyattsville, Maryland (I Cogdell Tr. 26, 56).⁸ Respondent offered to prove at trial that his escape was compelled by intolerable conditions at the District of Columbia Jail (App. 230; I Cogdell Tr. 13-14). Because respondent had not surrendered to authorities following his escape, however, the trial court ruled that he was not entitled to raise the proposed defense, and it excluded the proffered evidence (App. 228-230; I Cogdell Tr. 11-14).

⁸ Respondent Cogdell had been brought to the District of Columbia Jail under a writ of habeas corpus ad prosequendum to appear for a status call in the District of Columbia Superior Court, where he had been indicted for forgery, unauthorized use of a vehicle, and carrying a pistol without a license (I Cogdell Tr. 22-29). He was transferred to the District of Columbia Jail from the Fairfax County Jail in Virginia, where he had been committed following a state conviction for uttering and delivering a forged instrument (Pet. App. 102a & n.3).

C. The Decision of the Court of Appeals

The court of appeals, with one judge dissenting, reversed the convictions in both cases and remanded for new trials. The majority concluded that the district court erred in its instructions concerning the intent element of the escape offense and in its imposition of a "return requirement" on the defense of duress.

1. The court of appeals began with the observation that any attempt to label escape as a "general intent" or a "specific intent" crime only generated "unnecessary confusion" and "unhelpful complexity" that impeded analysis (Pet. App. 6a-7a). In the court's view, although the word "escape" is not "self-defining," it implies "an intent to leave and not to return" (*ibid.*, quoting *United States v. Nix*, 501 F.2d 516, 518 (7th Cir. 1974)) or "an intent to avoid confinement" (Pet. App. 8a). The court agreed that the "intent to avoid confinement" is ordinarily established merely by proof of the act of flight from custody (*id.* at 9a). It held, however, that where the defense offers "evidence of jail conditions, threats, and violence such as that presented" by respondents, it is at least questionable whether the escape was based on an intent to avoid "confinement" or an intent to avoid the unpleasant conditions present at the jail (*id.* at 10a). The court sharpened its exposition by explaining that the intent element of the escape offense is the intent to avoid "normal conditions of confinement" (*id.* at 9a n.17; emphasis in original):

[I]f a prisoner offers evidence to show that he left confinement *only* to avoid conditions that are not normal aspects of "confinement"—such as beating in reprisal for testimony in a trial, failure to provide *essential* medical care, or homosexual attacks—the intent element of the crime of escape may not be satisfied. When a defendant introduces evidence that he was subject to such "non-confinement" conditions, the crucial factual determination on the intent issue is thus whether the defendant left custody *only* to avoid these conditions or whether, in addition, the defendant *also* intended to avoid confinement.

On this basis, the court concluded that the trial judge erred in instructing the jury that the intent element of the crime encompassed only the general intent consciously and willfully to flee from confinement. Instead, where the issue of intent is raised by the defense, it is for the jury to decide whether the defendant was motivated by the improper desire to avoid "confinement" per se or by the permissible desire to avoid onerous conditions "that are not normal aspects of 'confinement'" (Pet. App. 9a n.17, 11a).⁹

⁹ Where the issue of intent is raised by the defendant, the court stated (Pet. App. 11a): that the

prosecutor may argue that the conditions allegedly necessitating the defendant's departure from custody were relatively mild, that alternative remedies short of escape (*e.g.*, resort to prison authorities or the courts) were available, or that the defendant failed to return voluntarily to custody once the conditions allegedly motivating the escape no longer threatened him.

The charge given in this case improperly precluded the jury from considering such evidence in relation to respondents' intent (*id.* at 14a-15a).

2. The court of appeals also held that the trial judge erred in refusing to submit the defense of duress to the jury on the ground that respondents had failed to surrender to lawful authorities following their escape. The court conceded that respondents' evidence of threats and harsh conditions of confinement "does not establish a classic [duress or] necessity defense" (Pet. App. 17a n.29). As the court noted (*id.* at 16a n.29):

The duress defense normally requires a defendant to establish that he engaged in criminal conduct only because he was compelled to do so by another person's unlawful threat which caused him reasonably to believe that he must commit the crime to avoid imminent death or serious bodily harm to himself or a third person.

The evidence of harsh prison conditions in this case concerned events long preceding the escape, and there was no evidence that, at the time the escape occurred, respondents faced imminent harm from the claimed improper conditions (*id.* at 63a; Wilkey, J., dissenting). The court solved the problem by "avoiding unhelpful labels such as 'duress' and 'necessity,'" with their settled common law meaning, and "by concentrating on the basic principles underlying [the] proffered defense" (*id.* at 17a). It dismissed the traditional duress requirement of imminent or "immediate" harm" as "particularly inappropriate in escape

cases, where a possibility of escape * * * is not likely to remain available until a substantial threat becomes 'immediate' * * *" (*id.* at 21a n.39). The court then concluded that there was sufficient evidence of harsh conditions at the District of Columbia Jail for the defense of duress to have been submitted to the jury in this case.

Moreover, while the court of appeals acknowledged that state and federal decisions have held that the defense of duress may be raised in an escape prosecution only where the defendant has voluntarily returned to custody following the escape (Pet. App. 23a, citing, *e.g.*, *United States v. Michelson*, 559 F.2d 567 (9th Cir. 1977), and *People v. Lovercamp*, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (1974)), the court interpreted these cases as standing for the proposition that the duress defense "lasts only as long as" the conditions justifying escape continue to exist (Pet. App. 24a). Accordingly, where a defendant fails to make any reasonable effort to surrender after his escape, the question whether "the conditions establishing the defense * * * continue for the period [the] prisoner remains at large" (*id.* at 26a n.52) is an issue for the jury, not the trial judge, to determine (*id.* at 25a-26a).¹⁰

¹⁰ Although the court of appeals therefore held that a duress defense must justify both the initial departure and the continued absence, it concluded that the return requirement was inapplicable to the facts of *this* case because respondents "were indicated [only] for 'flee[ing] and escap[ing]' '[o]n or about August 26, 1976,'" rather than for failing thereafter

3. Judge Wilkey dissented. With regard to the defense of duress, Judge Wilkey stated that the relevant question (Pet. App. 89a-90a)

is not whether a particular condition is or is not a "normal" incident of prison life, but, rather, is whether the condition is such as to raise in the defendant's mind a well-grounded apprehension of serious bodily injury or death.

Respondents' claims of harsh prison conditions did not fit the above definition, since they concerned incidents that occurred a considerable time prior to the escape. Judge Wilkey noted that there was nothing in the evidence to suggest that at the time of the escape respondents were acting in response to any imminent threat of death or serious bodily injury (*id.* at 63a-64a). Furthermore, Judge Wilkey observed that "[n]o evidence whatsoever was adduced to show that [respondents] turned themselves in after they had escaped the danger they alleged existed" (*id.* at 59a) and that respondents "adduced *no evidence whatever* justifying their continued absence from custody" (*id.* at 61a; emphasis in original). He therefore concluded that respondents' claims were insufficient as a matter of law to establish the defense of duress and that the trial judge correctly refused to place the issue before the jury.

to return to the jail (Pet. App. 25a). Hence, it was "error for the trial court to deny a [duress] instruction on the ground that the defendants had not returned or adequately explained their continued absence" (*ibid.*).

Judge Wilkey also disagreed with the court of appeals' conclusion that the evidence of prison conditions was relevant to respondents' intent in fleeing from the District of Columbia Jail. He observed that the court's construction of the federal escape statute as requiring a "specific intent" to escape from "normal aspects of confinement" constituted a radical departure from the common law definition of the crime, which, in the absence of any contrary legislative history, Congress presumably adopted in its enactment of 18 U.S.C. 751(a) (Pet. App. 74a-78a). He further noted that the majority's formulation of the intent element was in conflict with numerous decisions under Section 751 and analogous escape statutes and that, by weakening the prohibition against escape, it threatened serious consequences for the safe administration of federal penal facilities (*id.* at 78a-80a, 51a).

The court of appeals denied the government's petition for rehearing en banc by a 5-4 vote (Pet. App. 98a-99a, 117a-118a).

INTRODUCTION AND SUMMARY OF ARGUMENT

Imprisonment of suspected or convicted criminals in England dates back to the early Middle Ages. For nearly as long, society had been plagued by the problem of prison escape.¹¹ Such escapes, because of their

¹¹ At common law there were two related crimes, "escape" and "prison breach." Both involved an unauthorized departure from custody, but the latter offense was accomplished with the use of force. 1 M. Hale, *Pleas of the Crown* 590 (1847); R. Perkins, *Criminal Law* 501 (2d ed. 1969); 1 W. Burdick,

potential for substantial violence and disorder and their contempt for the rule of law (see *United States v. Brown*, 333 U.S. 18, 21 n.5 (1948)), have always been treated as extremely serious matters.¹²

The court of appeals' decision in this case departs radically from prior analysis of the crime of escape. The court's conclusion that escape constitutes a crime only when the prisoner is acting with the "specific intent" to avoid "normal conditions of confinement" is a novel interpretation of the offense that draws no support from the language or legislative history of the federal escape statute and that conflicts with numerous state and federal decisions. Moreover, the court's conclusion that a defense of duress based on harsh prison conditions may be raised at trial even though the prisoner was not threatened with imminent serious harm, failed to avail himself of lawful civil remedies, and remained in hiding over a prolonged period of time after the escape converts

Law of Crime § 307 at 462, § 312 at 468 (1946). See *Hobert and Stroud's Case*, 79 Eng. Rep. 784 (K.B. 1630). These distinctions have been largely eliminated in American criminal law, and the federal escape statute, 18 U.S.C. 751, encompasses both offenses. See *Model Penal Code* § 208.33 at 133, Comment (Tent. Draft No. 8, 1958).

¹² See R. B. Pugh, *Imprisonment in Medieval England* 218, 227 (1968). References to escape have been traced as far back as the Pipe Roll of 1130, and the first recorded punishments for the offense occurred during the reign of Henry I. It was the original practice to treat all escaped prisoners as though they were convicted felons and to require them to suffer the felon's fate. *Id.* at 227-228. See L. Fox, *The English Prison & Borstal Systems* 19-20 (1952).

the crime into a self-help device for prison conditions that an inmate deems intolerable.

I

The district court correctly refused to instruct the jury on respondents' defense of duress. Although a defendant generally is entitled to have the jury charged on his theory of the case, a court need not give an instruction if it lacks evidentiary support. The proof in this case failed to satisfy several essential elements of the duress defense.

A. The concept of "coercion" as an affirmative defense to a criminal charge has long been part of our criminal justice system. The rationale for the defense is that a person who has been compelled by human or natural forces to commit an offense against his will cannot fairly be blamed for his wrongful act. Although the conduct remains criminal, for reasons of social policy it is excused.

Not long after the defense was recognized, however, it became apparent that it was susceptible to abuse. Defendants could assert that their unquestionably criminal actions were the product of coercion, and such assertions were often difficult to disprove. As a result, the defense was quickly hedged by restrictions designed to limit its availability to situations in which the defendant had no reasonable alternative but to commit the offense charged: the force or threats that prompted the criminal conduct must have produced in the defendant a reasonable fear of immediate death or serious bodily injury,

the defendant must have had no reasonable opportunity to avoid the threatened harm, and the criminal acts must not have exceeded the magnitude or duration of the coercion.

B. Although, in theory, duress has always been available as a defense to the crime of escape, courts have been reluctant to allow inmates to contend that their unauthorized departure was compelled by intolerable prison conditions. Such claims could easily be made in virtually every escape prosecution, and any suggestion that there might be a legal justification for escape could lead to a rash of prison escapes or a breakdown in prison discipline.

In an effort to accommodate these legitimate concerns with the equally legitimate demands of prisoners forced to flee from custody because of genuine dangers to their health or safety, the courts have insisted on scrupulous adherence to a number of requirements patterned after the traditional duress standards. The prisoner must show that he was faced with a specific threat of death or substantial bodily injury in the immediate future, that there was no time or opportunity to complain to the authorities or resort to the courts, and that he ceased his criminal acts at the earliest reasonable moment by turning himself in once he had attained a position of safety.

C. The evidence offered by respondents failed to meet the immediacy or return requirements of the duress defense. The allegations of fires, threats and assaults at the District of Columbia Jail all related

to past incidents, not to imminent threatened harm, and respondents did not surrender after the escape or otherwise explain their continued and prolonged absence from custody.

The reasons offered by the court of appeals to excuse compliance with these conditions are unpersuasive. Even if the "imminent harm" standard should be applied liberally in escape cases because of the realities of the prison environment, it would not help respondents here. There was no reasonable temporal relationship between the threatened injuries and the commission of the illegal acts. Moreover, the indictment sufficiently charged respondents with a continuing offense to require them to explain their failure to return to prison after the escape.

II

A. The court of appeals erred in holding that the crime of escape requires proof of a "specific intent" to avoid "normal aspects of confinement" and that the evidence of harsh prison conditions should therefore have been submitted to the jury for its bearing on respondents' intent.

1. At common law, escape consisted simply of a prisoner's unauthorized departure from lawful custody. No state of mind was required to commit the offense other than the intent to go beyond permitted limits.

2. Nothing in the language or background of the federal escape statute reflects a congressional intent to depart from the common law rule. 18 U.S.C.

751(a) broadly prohibits all "escape[s] from * * * custody." The word "escape" is unqualified, and undefined terms in a statute, especially a criminal statute, are presumed to have their common law meaning. Indeed, the legislative history of Section 751(a) confirms that Congress did not intend to alter the mental element traditionally required for escape, because it considered and rejected a proposal that would have limited the crime to departures from prison committed "with intent to escape from custody."

3. The lower courts have consistently construed the federal escape statute to require only a general intent to leave custody. The sole federal decision relied on by the court of appeals, *United States v. Nix*, 501 F.2d 516 (7th Cir. 1974), was concerned with the application of the intoxication defense to escape cases and expressly declined to label the "intent to avoid confinement" required by Section 751(a) as a "specific intent." Moreover, the phrase "intent to avoid confinement" hardly suggests that an inmate must have departed the prison with any ultimate motive or purpose, much less lends support to the court of appeals' unprecedented conclusion that the escape statute requires the government to prove a "specific intent" to escape from "normal" incidents of confinement.

4. It follows from the conclusion that escape is a general intent crime that respondents' evidence of conditions at the District of Columbia Jail was irrelevant to the issue of intent. Defenses such as du-

ress and necessity, unlike defenses such as mistake, insanity, or intoxication, do not exculpate by negating the mental element of the crime. A defendant who commits an offense under coercion nonetheless possesses mens rea, although for reasons of social policy he may be excused from criminal liability. The proof at trial showed beyond a reasonable doubt that respondents knowingly left the jail and that they were aware of the consequences of their actions. Hence, even assuming that their escape was the result of overwhelming compulsion, respondents still would have acted with the requisite criminal intent.

B. The court of appeals' formulation of the intent requirement contains the seeds of substantial mischief. The primary focus of future escape trials will be a factual assessment of the acceptability or "normality" of an inmate's conditions of confinement. By thus weakening the prohibitions against escape, the decision below threatens to subvert prison discipline and to endanger corrections personnel and the public.

ARGUMENT

I

THE DISTRICT COURT CORRECTLY REFUSED TO INSTRUCT THE JURY ON THE DEFENSE OF DURESS

A. The Duress Defense Has Always Been Confined to Instances in Which the Defendant Had No Reasonable Alternative But to Commit the Crime Charged

The concept of "duress" as an affirmative defense to a criminal charge is "anciently woven into the fabric of our culture." J. Hall, *General Principles*

of *Criminal Law*, 416 (2d ed. 1960).¹³ Generally, a person will not be held criminally liable if he has been forced by another to commit the offense. The rationale for the defense is excuse: although the act committed is criminal, "for reasons of social policy, it is better that the defendant, faced with

¹³ See Arnolds & Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil*, 65 J. Crim. L. 289, 291 (1974). The common law defense of compulsion, recognized as long ago as 1551 in *Reninger v. Fagossa*, 75 Eng. Rep. 1, distinguished between "duress" and "necessity." See 1 M. Hale, *supra*, at 49-57. The defense of "duress" excused unlawful conduct resulting from the threat of another person. W. LaFave & A. Scott, *Handbook on Criminal Law* § 49 (1972). Duress could be invoked only to excuse the specific offense that the defendant had been forced to commit. Gardner, *The Defense of Necessity and the Right to Escape from Prison—A Step Towards Incarceration Free From Sexual Assault*, 49 S. Cal. L. Rev. 110, 120 (1972). By contrast, the defense of "necessity" involved compulsion by natural forces and justified the defendant's selection of unlawful conduct as the lesser of the evils. 1 W. Burdick, *supra*, § 198 at 261; W. LaFave & A. Scott, *supra*, § 50. "Necessity" was also theoretically distinct from "duress" because it negated the actus reus element of criminal responsibility. The actor accepted responsibility for his act but asserted that it was neither morally nor legally wrong under the circumstances. If the defense of "necessity" was successful, the act was condoned and the actor sometimes lauded for his exercise of judgment. Gardner, *supra*, 49 S. Cal. L. Rev. at 116. These distinctions have become blurred over the years, and the courts have used the terms interchangeably. See *United States v. Cullen*, 454 F.2d 386, 391 n.12 (7th Cir. 1971); 1 W. Burdick, *supra*, § 198 at 260-261; W. LaFave & A. Scott, *supra*, § 49 at 374, § 50 at 382; *Model Penal Code* § 209 at 5, Comment (Tent. Draft No. 10, 1960); 43 U. Cin. L. Rev. 956, 961 (1974); 37 Mo. L. Rev. 550, 551 & n.13 (1972).

a choice of evils, choose to do the lesser evil (violate the criminal law) in order to avoid the greater evil threatened by the other person." W. LaFave & A. Scott, *Handbook on Criminal Law* § 49 at 374 (1972). Blackstone offered the following explanation:

A * * * species of defect of will is that arising from *compulsion* and inevitable *necessity*. These are a constraint upon the will, whereby a man is urged to do that which his judgment disapproves; and which, it is to be presumed, his will (if left to itself) would reject. As punishments are therefore only inflicted for the abuse of that free will, which God has given to man, it is highly just and equitable that a man should be excused for those acts which are done through unavoidable force and compulsion.

4 W. Blackstone, *Commentaries on the Laws of England* 27 (1897). Simply stated, it has always been an accepted part of our criminal justice system that punishment is inappropriate for crimes committed under duress because the defendant in such circumstances cannot fairly be blamed for his wrongful act.

Despite these broad justifications, the duress defense has been limited from the outset in several significant respects. The obvious reason for these restrictions is that the doctrine "held within it the germs of potential disorder." Newman & Weitzer, *Duress, Free Will and the Criminal Law*, 30 S. Cal. L. Rev. 313, 314 (1957). If believed by the jury—and proof of duress often consisted of little more than the accused's self-serving assertions—the de-

fense operated to free defendants who had admittedly committed all the elements of a criminal offense. "The business of excusing individuals from crimes which, in the last analysis they had committed bodily, was a difficult and dangerous affair. Who could see or wisely guess at the presence of a will which freely motivated the body in that dreadful moment of criminal action? Inference, not observation, was the species of proof, and inferences, it was thought, required the aid of standards. If the doctrine was not to be the plaything of the shrewd and the unscrupulous (and were not those suspected of crimes already questionable in that respect?) it had to be well hedged and strict of proof." *Ibid.*

Hence, the defense became subject to three main limitations. First, the threatening conduct that prompted the criminal act must have produced in the defendant a reasonable fear of immediate death or serious bodily harm. 1 W. Burdick, *supra*, § 199 at 262-263.¹⁴ "Threatened future death or serious bodily harm, or threatened immediate *non-serious* bodily harm or property damage, or a threat which produces an *unreasonable* fear of immediate death or serious bodily harm, will therefore not suffice." W. LaFave & A. Scott, *supra*, § 49 at 377-378. Second, the defense was not recognized for the crime of mur-

¹⁴ See *United States v. Wood*, 566 F.2d 1108, 1109 (9th Cir. 1977); *United States v. Kelley*, 546 F.2d 42 (5th Cir. 1977); *United States v. Patrick*, 542 F.2d 381, 388 (7th Cir. 1976), cert. denied, 430 U.S. 931 (1977); *D'Aquino v. United States*, 192 F.2d 338, 358 (9th Cir. 1951), cert. denied, 343 U.S. 935 (1952).

der.¹⁵ Finally, the defendant must have had no reasonable opportunity to avoid the threatened harm, and the threat must have lasted for the duration of the criminal conduct.¹⁶

Each of these essential conditions was designed to confine the defense to those situations, and only those situations, in which the commission of the crime was unquestionably the lesser of the evils with which the defendant was faced. If the accused could have eluded the threat or force without committing the crime, or if the scope of the crime exceeded the extent of the threat either in magnitude or in time, then there was no reason for society to consider commission of the offense as the most acceptable alternative under the circumstances or to absolve the

¹⁵ See W. LaFave & A. Scott, *supra*, § 49 at 377; Note, *Have the Doors Been Opened?—Duress and Necessity as Defenses to Prison Escape*, 54 Chi.-Kent L. Rev. 913, 918 (1978); 37 Mo. L. Rev. at 552 & n.15.

¹⁶ See, e.g., *Respublica v. McCarty*, 2 U.S. (2 Dall.) 86 (1781), where the defendant, charged with treason by joining the army of Great Britain, contended that he had done so under duress, having already been taken prisoner. The court rejected the claim, noting that defendant had "remained * * * with the British troops for ten or eleven months, during which he might easily have accomplished his escape; * * * had the defendant enlisted merely from the fear of famishing, and with a sincere intention to make his escape, the fear could not surely always continue, nor could his intention remain unexecuted for so long a period" (*id.* at 87). See also Note, *Duress and the Prison Escape: A New Use for an Old Defense*, 45 S. Cal. L. Rev. 1062, 1067 (1972); 43 U. Cin. L. Rev. at 963.

defendant of responsibility for his criminal actions.¹⁷

B. Although Duress is Available as a Defense to Prison Escape, the Defendant Must Show That He Fled in Order To Avoid An Imminent and Substantial Harm and That He Ceased The Illegality at the Earliest Reasonable Moment

Although coercion has always been theoretically available as a defense to the crime of prison escape,¹⁸

¹⁷ Congress has never adopted rules that justify or excuse the commission of an otherwise unlawful act on the basis of duress or necessity (see National Commission on Reform of Federal Criminal Laws, *Study Draft of a New Federal Criminal Code* 38 (1970)), but the federal courts have consistently applied the common law duress defense, including the three requirements outlined above, in federal prosecutions. See, e.g., *United States v. Saettele*, 585 F.2d 307, 309 & n.2 (8th Cir. 1978), cert. denied, No. 78-835 (Feb. 21, 1979); *United States v. Gordon*, 526 F.2d 406, 407 (9th Cir. 1975); *United States v. Nickels*, 502 F.2d 1173, 1177 (7th Cir. 1974); *R.I. Recreation Center, Inc. v. Aetna Casualty & Surety Co.*, 177 F.2d 603, 605 (1st Cir. 1949); *Shannon v. United States*, 76 F.2d 490, 493 (10th Cir. 1935).

S. 1, 94th Cong., 1st Sess. § 531 (1975), the initial version of the bill designed to revise the federal criminal code, provided that "[i]t is an affirmative defense to a prosecution under any federal statute, other than a prosecution under section 1601 (Murder), that the defendant engaged in the conduct charged because another person coerced him to do so by a clear threat of imminent and inescapable death or serious bodily injury to himself or any other person * * *." The amended version of the bill, S. 1437, 95th Cong., 2d Sess. § 501 (1978), eliminated this section in favor of a general provision recognizing "an affirmative defense of * * * duress * * * [which] shall be determined by the courts of the United States according to the principles of the common law as they may be interpreted in the light of reason and experience."

¹⁸ See 1 M. Hale, *supra*, at 611, citing 2 E. Coke, *Institutes* 590 (1630):

If the prison be fired by accident, and there be a necessity to break prison to save [the prisoner's] life, this

courts have shown an understandable reluctance to relieve escapers of criminal liability on the ground that they were acting under "duress."¹⁹ For one thing, "if prisoners were to decide when conditions were intolerable and treatment inhuman no discipline in a prison would be possible * * *." Newman & Weitzer, *supra*, 30 S. Cal. L. Rev. at 321. In light of prison conditions that even now prevail in the United States, it would be the rare inmate who could not convince himself that continued incarceration would be harmful to his health or safety. As Judge

excuseth the felony; but if the prison were fired by the prisoner himself, or by his procurement, the breaking to save his life is nevertheless felony, for it was a necessity of his own creating.

See also *Baender v. Barnett*, 255 U.S. 224, 226 (1921) ("common sense accepts the ruling, cited by Plowden, that the statute of 1st Edward II, which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire—'for he is not to be hanged because he would not stay to be burnt'"); Gardner, *supra*, 49 S. Cal. L. Rev. at 119 n.48.

¹⁹ To some extent this judicial hesitancy is attributable to the fact that most prison escape cases do not satisfy the classic duress model. Duress "generally supposes commission of the very crime demanded by the coercer. In this way the coercer is liable for the crime although his agent, the coerced, may be excused. The theory * * * breaks down when the agent commits a crime other than the one demanded by the coercer." Gardner, *supra*, 49 S. Cal. L. Rev. at 128. Indeed, the court of appeals acknowledged that "[m]ost of the arguments and evidence presented by [respondents] do not fit within the standard definition of a 'duress' or 'necessity' defense" (Pet. App. 16a n.29).

Wilkey remarked (Pet. App. 51a), "the circumstances of prison life are such that at least a colorable, if not credible, claim of duress or necessity can be raised with respect to virtually every escape, and disproof of such claims can be quite difficult."

Moreover, the duress defense, always subject to abuse, would be particularly susceptible to misuse at the hands of prison inmates, a group that has already demonstrated its willingness to break the law. An "inmate may escape from prison to attain his freedom in the hopes that he will not be apprehended; later, if arrest appears imminent, he may turn himself in to the authorities and plead duress as a defense to the escape." Note, *supra*, 45 S. Cal. L. Rev. at 1066. Prisoners might also plot together to "coerce" their fellow prisoners to escape in the hope of providing a risk-free defense in the event that the escapers are captured. See 1975 U. Ill. L. F. 271, 278; Note, *supra*, 45 S. Cal. L. Rev. at 1081. In sum, in order to discourage a rash of prison escapes or challenges to prison discipline caused by suggesting that there might be a legal justification for escape, courts until quite recently, while willing in theory to recognize defenses based on compulsion as applicable in escape cases, always found reasons to deny the defense on the particular facts before them.

The most comprehensive explication of the inevitable tensions between the duress defense and the crime of prison escape is provided in *People v. Lovercamp*, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110

(1975), the first appellate decision to analyze the competing considerations and to find the defense available to an escape defendant. There, the defendant, a female inmate of low intelligence, had been threatened repeatedly by a group of inmates who sought to force her to perform lesbian acts. When the defendant's complaints to the prison authorities elicited no response and she was again confronted by a hostile group that promised to return, she fled. Defendant was quickly apprehended in a hayfield a few yards from the prison. The trial judge refused to charge the jury on the defense of duress, and the defendant was convicted of escape.

The California Court of Appeal reversed, holding that the defendant was entitled to a duress instruction in light of her offer of proof. The court remarked that, despite the indisputable public interest in deterring prison escapes, "[i]n a humane society some attention must be given to the individual dilemma" of an inmate threatened with substantial harm if he remains within the penal institution. At the same time, however, the court stressed that "the defense of necessity to an escape charge is extremely limited in its application" (43 Cal. App. 3d at 831, 118 Cal. Rptr. at 115), and it set forth five conditions that must be satisfied by the evidence before the defense may be submitted to the jury (43 Cal. App. 3d at 831-832, 118 Cal. Rptr. at 115):

- (1) The prisoner is faced with a specific threat of death, forcible sexual attack or substantial bodily injury in the immediate future;

(2) There is no time for a complaint to the authorities or there exists a history of futile complaints which make any result from such complaints illusory;

(3) There is no time or opportunity to resort to the courts;

(4) There is no evidence of force or violence used towards prison personnel or other "innocent" persons in the escape; and

(5) The prisoner immediately reports to the proper authorities when he has attained a position of safety from the immediate threat.

The proof offered by the defendant had established all but the final "return" requirement, and that issue was incapable of resolution because she had been captured so soon after her departure.

The conditions adopted in *Lovercamp* in an effort to tailor the traditional duress defense to the crime of prison escape have met with widespread acceptance in a number of other jurisdictions over the past four years. See, e.g., *United States v. Boomer*, 571 F.2d 543 (10th Cir.), cert. denied, 436 U.S. 911 (1978); *Stewart v. United States*, 370 A.2d 1374 (D.C. 1977); *State v. Reese*, 272 N.W.2d 863 (Iowa 1978); *State v. Horn*, 58 Haw. 252, 566 P.2d 1378 (1977); *Johnson v. State*, 379 A.2d 1129 (Del. 1977); *State v. Boleyn*, 328 S.2d 95 (La. 1976); *State v. Worley*, 265 S.C. 551, 220 S.E.2d 242 (1975); *Commonwealth v. Stanley*, No. 297 (Pa. Super. Ct. April 12, 1979). See also *United States v. Bryan*, 591 F.2d 1161, 1162-1163 (5th Cir. 1979); Note, *supra*, 54 Chi.-Kent L. Rev. at 930 n.104. Two of the *Lovercamp* prerequisites are particularly im-

portant and particularly relevant to respondents' claims in this case: the requirements that the threat of harm be immediate and that the inmate surrender promptly once the immediate danger has been avoided by the escape.

The immediacy requirement is, of course, nothing more than a restatement of black letter law applicable to every attempt to assert a coercion defense. See pages 24-25, *supra*. The element of immediacy insists upon recourse to lawful alternatives whenever possible; hence, this requirement makes the defense unavailable whenever sufficient time exists for the defendant to exercise such options. Stated differently, when there is ample opportunity either to avoid a perceived threat or to seek a lawful solution to the problem, there is no reason to excuse a violation of the law. Moreover, "until the threatening disaster is pretty close to happening, there may arise a chance both to refuse to do the criminal act and also to avoid the threatened harm * * *." W. LaFave & A. Scott, *supra*, § 49 at 379. See *United States v. Wood*, *supra*, 566 F.2d at 1109; *United States v. Gordon*, *supra*, 526 F.2d at 408.

A prisoner's obligation to surrender after his escape is also closely related to a basic limitation on the duress defense—that the crime not exceed the extent of the coercion. "An important element of establishing duress is showing that the criminal activity stopped as soon as possible after the threat was removed. When a prisoner escapes under compulsion the threat is removed once he is outside the prison.

Consequently, an escapee must prove that he attempted to turn himself in to the authorities as soon as practicable after the escape." 43 U. Cin. L. Rev. at 963.

As we have previously noted, the defense of duress excuses an offense committed as the result of fear of imminent death or grievous bodily harm. Thus, if a defendant can establish that such factors prompted his departure from confinement, the defense may excuse *that* particular act. The courts are in agreement, however, that escape under 18 U.S.C. 751(a) is a continuing offense and that, even though an inmate's initial flight from prison may have been excusable, his continued absence from custody is itself sufficient to constitute the crime.²⁰ Hence, although the force or threats upon an inmate may have been genuine and compelling at the time of his departure, they cannot forever provide him with an ironclad defense to an escape charge. Evidence of duress justifying only a prisoner's initial escape would be an insufficient defense, as a matter of law, since it would fail to excuse his subsequent, continuing escape. See *United States v. Michelson*, *supra*, 559 F.2d at 570 (footnotes omitted):

²⁰ See *United States v. Chapman*, 455 F.2d 746, 749 (5th Cir. 1972). See also *United States v. Chuck*, 542 F.2d 728, 732 (8th Cir.), cert. denied, 429 U.S. 986 (1976); *United States v. Spletzer*, 535 F.2d 950, 954 (5th Cir. 1976); *United States v. Woodring*, 464 F.2d 1248, 1250 (10th Cir. 1972); *United States v. Coggins*, 398 F.2d 668 (4th Cir. 1968); *Chandler v. United States*, 378 F.2d 906, 908 (9th Cir. 1967).

[W]hile coercion may shield the escapee from the imposition of additional punishment, it does not commute the sentence previously imposed. * * * For this reason, an escape will not be excused by reason of duress if the escapee fails to submit to proper authorities immediately after attaining a position of safety. The inmate's failure to submit to proper authorities following the allegedly coerced escape amounts to an unexcused commission of the crime of escape. Therefore, when an escapee fails to submit to proper authorities, the asserted duress defense must be rejected because as a matter of law it does not negate the continued absence from custody.

Accord, *United States v. Bryan*, *supra*, 591 F.2d at 1162; *United States v. Boomer*, *supra*, 571 F.2d at 545. See also Annot., 69 A.L.R. 3d 678, 689 (1976).

There are, in addition, compelling policy reasons for scrupulous adherence to the return requirement, because it eliminates many of the pragmatic problems that attend application of the duress defense to escape cases. As the court explained in *People v. Lovercamp*, *supra*, 43 Cal. App. 3d at 831, 118 Cal. Rptr. at 115, the rule requiring a prisoner to turn himself in to the proper authorities upon attaining a position of safety from the threat renders the duress defense "meaningless to one who would use it as an excuse to depart from lawful custody and thereafter go his merry way relieved of any responsibility for his unseemly departure." In this respect, the requirement serves not only to prevent a perceived danger from

constituting a perpetual defense to an escape charge, but also to confirm the bona fides of the defendant's motivation for departing from custody. If, indeed, the inmate's only objective in escaping is to avoid an imminent and serious threat to his health or safety, once he has avoided the harm there is simply no justification for him to remain a fugitive and to forego relief from any continuing dangers through legitimate channels. The return requirement thus serves as a significant protection against manipulation of the duress defense by those whose subsequent conduct reveals a lasting intent to avoid serving their lawful term of custody.²¹

²¹ Three state courts have held that a defendant's failure to turn himself in to the authorities after his escape, while relevant to the defendant's motivation for leaving the prison, does not prevent the assertion of a duress defense as a matter of law. *Esquibel v. State*, 91 N.M. 498, 576 P.2d 1129, 1132 (1978); *People v. Unger*, 66 Ill.2d 333, 362 N.E.2d 319, 323 (1977); *People v. Luther*, 394 Mich. 619, 232 N.W.2d 184, 187 (1975). These decisions do not evaluate the return requirement in light of the continuing character of the escape offense, nor do they consider the relation between the return requirement and the traditional element of the duress defense that criminal conduct not exceed the duration of the coercive threats or force. In any event, as respondents have acknowledged (Walker Br. in Opp. 12 n.8), "[t]he manner in which state courts construe state statutes prohibiting escape, and the common law or statutory defenses to such crimes, is of course a different matter from the appropriate construction of a federal statute and the common law defenses appropriate for it."

C. The Evidence at Trial Failed to Satisfy The Requirements of the Duress Defense and Hence Did Not Warrant a Duress Instruction

In light of the principles outlined above, the proof offered at trial did not entitle respondents to an instruction on the defense of duress. Although a defendant generally is entitled to have the jury charged on his theory of the case, it is well settled that an instruction should not be given if it lacks evidentiary support. See, e.g., *Sansone v. United States*, 380 U.S. 343, 349-350 (1965); *United States v. Morales*, 577 F.2d 769, 774 (2d Cir. 1978); *United States v. Waskow*, 519 F.2d 1345, 1347 (8th Cir. 1975). When evidence has been presented in an attempt to raise an affirmative defense, the district court has the duty of determining whether the defense has a sufficient factual basis to place it before the jury. *Pierce v. United States*, 414 F.2d 163, 166 (5th Cir.), cert. denied, 396 U.S. 960 (1969); *Devine v. United States*, 403 F.2d 93, 95 (10th Cir. 1968), cert. denied, 394 U.S. 1003 (1969). If the evidence, taken in the light most favorable to the defendant, fails to establish the defense, then there is no factual issue for the jury to decide, and the court may properly refuse the instruction as a matter of law. *United States v. Glassel*, 488 F.2d 143, 146 (9th Cir.), cert. denied, 410 U.S. 941 (1973); *United States v. Ramsey*, 374 F.2d 192 (2d Cir. 1967).

1. The evidence offered by respondents failed to satisfy the immediacy requirement of the duress defense. In the context of prison escape, the courts have consistently required the perceived threat to be

of such imminence that the defendant had no reasonable alternative but to flee from custody.²² Although respondents Bailey, Cooley, and Walker testified that they had presented unavailing complaints through the jail's grievance system concerning the brutality, threats, and fires in the Northeast-1 cellblock,²³ and

²² See, e.g., *United States v. Kelley*, 546 F.2d 42 (5th Cir. 1977); *Brawdy v. State*, 590 P.2d 689, 691 (Okla. Crim. 1979); *Roy v. Commonwealth*, 500 S.W.2d 921, 922 (Ky. 1973); *State v. Boleyn*, *supra*, 328 S.2d at 97 n.2; *State v. Milum*, 213 Kan. 581, 516 P.2d 984, 986 (1973); *State v. Green*, 470 S.W.2d 565, 568 (Mo. 1971), cert. denied, 405 U.S. 1073 (1972); *People v. Richards*, 269 Cal. App. 2d 768, 75 Cal. Rptr. 597, 603-604 (1969); *State v. Davis*, 14 Nev. 439, 444 (1880). See generally Annot., *supra*, 69 A.L.R. 3d at 684-686.

²³ Corrections officials testified that respondents Cooley and Walker had never filed a grievance (App. 65-66, 207; Tr. 245-246, 743) and that the complaints filed by respondent Bailey had been investigated and found to be groundless (App. 63-64; Tr. 243).

During the period in question, the District of Columbia Jail offered inmates a number of formal procedures for voicing complaints about conditions of confinement. An aggrieved prisoner could complain orally to a staff member, case worker, or social worker, or to a legal aid or retained attorney, he could file a written complaint by placing it in a sealed mailbox (App. 209-210; Tr. 753), or he could submit a grievance petition to the Jail Adjustment Board or to supervisory officials (App. 61-62, 65-66; Tr. 239, 246, 251-252). In instances of alleged threats or brutality by a guard, the shift supervisor would normally be appointed to conduct an investigation, which would entail an interview of the complaining inmate, the corrections officer involved, and any other person having knowledge of the incident. Corrective action would be taken where appropriate (App. 63-64, 67, 207; Tr. 242-243, 255, 743). The federal prisons contain an even more elaborate grievance procedure. See *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 138 n.* (1977) (Burger, C.J., concurring).

Bailey testified that he had initiated an action for damages against one prison guard in the District of Columbia Superior Court (App. 18, 58, 61-62, 116-118, 148-152, 157-158, 194-195; Tr. 225, 239, 404-405, 478-484, 534-535, 710), there was absolutely no justification on the record for Cooley and Walker to elect escape rather than pursuit of their judicial or other lawful remedies²⁴ or for Bailey to choose self-help rather than adjudication of his pending legal claim.²⁵

²⁴ Respondent Cooley also contended that he had "made complaints to Judge Eugene Hamilton over at Superior Court" (App. 117-118; Tr. 405), but he did not elaborate on the content of these complaints or identify when they had occurred in relation to the alleged grievances or to the escape.

²⁵ The district court stated that it would have given a duress instruction but for respondent's failure to satisfy the return requirement (App. 219-220; Tr. 778-779). Although respondents and the court of appeals assume from this remark that the trial judge had concluded that respondents' evidence was sufficient to meet the immediacy requirement (see Pet. App. 21a n.39, 22a-23a n.43), this assumption may not be accurate. The district court did not expressly hold that respondents had satisfied the immediacy requirement, and the government's principal focus in opposing a duress instruction centered on the absence of evidence that respondents had attempted to surrender after their escape rather than on the imminence of the dangers that allegedly led to the escape.

Whatever the district court's view on the matter, it is clear that the court of appeals' concept of "immediacy" departs significantly from the traditional rule. As we discuss below, the majority expressly rejected the immediate harm standard as "an absolute prerequisite" in escape cases, "where a possibility for escape (especially nonviolent escape) is not likely to remain available until a substantial threat becomes 'immediate' * * *" (Pet. App. 21a n.39). In our view, Judge Wilkey correctly marshaled the precedents in observing that the defense is reserved for "back-to-the-wall situations" (*id.* at 63a).

Although one inmate asserted that cellblock fires were a daily occurrence (App. 99-100; Tr. 377), respondents themselves introduced documentary evidence which showed that the last of the fires (a trash fire) had occurred on August 16, 1976, 10 days prior to the escape (App. 78; Tr. 312, Deft. Exh. 1-B). Moreover, there was no evidence whatever to demonstrate that a fire had started in the cellblock on August 26, the day of respondents' escape, or that, immediately prior to the escape, respondents had any reason to anticipate an imminent recurrence of the incidents. Indeed, it appears that whether such conflagrations would pose a serious and immediate threat to the safety of respondents and the other inmates within the cellblock was often dependent upon respondents' own actions: respondent Bailey admitted that he had burned blankets, sheets and trash as a protest measure and respondent Cooley conceded that he had participated in such activities as well (App. 124, 173; Tr. 415, 572-573).²⁶

By the same token, while respondents Bailey and Cooley claimed that they had been assaulted by prison guards, the evidence once again reflects that the latest of the alleged incidents occurred either in late July or early August 1976, several weeks prior to the escape (App. 101-104, 109-110, 111-112, 116, 171-172; Tr. 379-380, 382, 384, 393, 396, 403, 568-569).

²⁶ Life-threatening emergencies resulting from a defendant's own misconduct cannot provide the basis for a duress defense. See W. LaFave & A. Scott, *supra*, § 50 at 388; R. Perkins, *supra*, at 951-961; note 17, *supra*.

Specifically, one inmate testified that respondent Cooley had been assaulted with a blackjack in July or the early part of August and that another incident had occurred prior to that time (App. 102-103, 104-105; Tr. 382, 384, 385). A second inmate testified that the last assault on respondent Cooley took place "about two or three weeks" before the escape (App. 107; Tr. 389). Respondent Cooley himself placed the date that he was struck by guards as on or about August 9, 1976, more than two weeks prior to the escape (App. 116; Tr. 403). Similarly, in regard to respondent Bailey, one inmate testified that respondent had been assaulted by guards during the second week of August (App. 109-110; Tr. 393), while another alleged that the last of the attacks occurred closer to the first part of that month (App. 111-113; Tr. 396-397). For his part, respondent Bailey stated that he did not believe his "fights" and "scuffles" with corrections officers had occurred after the end of July (App. 171-172; Tr. 567-569).

Testimony concerning the alleged threats to respondents Bailey and Cooley followed a similar pattern. A defense witness estimated that the threats by corrections officers against respondent Cooley occurred in late July or early August 1976 (App. 101-102, 113; Tr. 380, 398). Respondent Bailey stated that he could not recall when the guards had threatened to kill him if he testified in the case in which he had been subpoenaed as a witness, but he conceded that he did not receive any threats immedi-

ately prior to his escape (App. 141-142, 155-156, 169-171, 174; Tr. 468-469, 532, 565-567, 583).

While respondent Walker presented evidence tending to show that he suffered from epileptic seizures (App. 183-188; Tr. 622-650), this evidence was also devoid of any suggestion that the alleged condition presented an immediate or life-threatening danger that warranted an escape. To the contrary, the proof established that, even though respondent Walker's condition was not confirmed by medical examination, medical personnel, relying solely upon respondent's complaints, had prescribed medication as a precautionary measure (App. 133-136, 190-191; Tr. 438-441, 679-681).²⁷

Finally, although respondent Cooley initially claimed that respondents Walker and Bailey had threatened to kill him on the morning of the escape if he did not join them, he later repudiated this testimony and admitted that, when he left the jail, he was by himself and had no idea whether Walker and Bailey

²⁷ See *State v. Worley*, *supra*, 265 S.C. at 554, 220 S.E.2d at 243, and *People v. Davis*, 16 Ill. App. 3d 846, 306 N.E.2d 897, 898 (1974), holding that claims of inadequate medical treatment cannot excuse a prison escape unless the alleged condition constituted an immediate, serious threat to the prisoner's life or health and he had exhausted available legal remedies.

This Court held in *Estelle v. Gamble*, 429 U.S. 97, 104 (1976), that prison officials' deliberate indifference to an inmate's medical needs "constitutes the 'unnecessary and wanton infliction of pain' * * * proscribed by the Eighth Amendment." Respondent did not introduce any evidence to prove that he had attempted to avail himself of this judicial remedy or his remedy under the Federal Tort Claims Act.

had escaped as well (App. 115-116, 117-118, 130-131; Tr. 402, 405, 424-425).

In sum, as Judge Wilkey observed in dissent, the evidence offered by respondents "could hardly be found to establish the seriousness, immediacy, and imminence of danger required to make out duress" (Pet. App. 63a). Indeed, the majority did not expressly disagree with this conclusion: it instead rejected the "dissent's narrow insistence on threats of 'immediate' harm as an absolute prerequisite for the choice of evils defense," viewing the requirement as "particularly inappropriate in escape cases, where a possibility for escape (especially nonviolent escape) is not likely to remain available until a substantial threat becomes 'immediate' in the narrow sense urged by the dissent" (*id.* at 21a n.39).

The court of appeals' view of the immediacy requirement is troubling, since it necessarily implies that where an individual has the option of employing either lawful or unlawful means of averting future harm, he may choose the unlawful alternative. There admittedly is something to be said for the view that the traditional duress requirement of "imminent" harm should be relaxed somewhat in escape cases because of the realities of the prison environment.²⁸ But whatever the validity of this contention,

²⁸ In *Lovercamp*, for example, the lesbian inmates were not actually pursuing the defendant at the time of her escape. They had threatened her earlier in the day. Nonetheless, the court held that the immediacy requirement was satisfied because the jury could find that the defendant had been

it is of little help to respondents here. Unless the element of imminent threatened harm is to be wholly severed from the duress defense, contrary to both the common law rule and the policy reasons that gave rise to the defense, there must be *some* reasonable temporal relationship between the threatened injury and the commission of the illegal act. See Note, *supra*, 54 Chi.-Kent L. Rev. at 933; Note, *supra*, 45 S. Cal. L. Rev. at 1074-1075. The undisputed lapse of *several weeks* between the alleged fires, threats, and assaults and respondents' flight from the District of Columbia Jail cannot satisfy even this more liberal standard.

2. The evidence also was insufficient to meet the return requirement of the duress defense. It was conceded at trial that none of the respondents turned himself in to the proper authorities after he had escaped the dangers that allegedly existed at the District of Columbia Jail; each was captured by FBI agents more than a month later. Furthermore, respondents Bailey, Cooley and Cogdell admitted that they had not even attempted to contact the authorities after their escape, and although respondent Walker claimed a "constant rapport with the FBI," there was no evidence that he ever notified the agents of his whereabouts so that he could surrender. See pages 6-7, *supra*.

motivated to leave the prison by the threat of real and inevitable serious harm in the near—and unpredictable—future. 43 Cal. App. 3d at 832, 118 Cal. Rptr. at 115.

a. The court of appeals did not dispute the trial judge's finding that respondents had presented no evidence from which the jury could have found that they satisfied the return requirement (App. 219-220; Tr. 778-779). It nonetheless concluded that the defect was not fatal to respondents' duress claim and that the defense should have been submitted to the jury. Analyzing decisions, including *Lovercamp*, that have imposed a return requirement, the court held that the cases simply stood for the proposition that a choice of evils defense exists only so long as the conditions that led to the escape continue (Pet. App. 24a). Thus, "[a]n acceptable version of the 'return requirement' would include (1) an instruction that escape is a continuing offense, and (2) an instruction that a choice of evils defense cannot justify continued absence if the conditions establishing the defense * * * do not continue for the period a prisoner remains at large" (*id.* at 26a n.52). Hence, according to the court below, if confinement conditions that would justify an inmate's initial departure from prison persist (or perhaps even if the defendant only believes they persist) after the escape, they provide the inmate with an ongoing defense for his continued absence and relieve him of any obligation to seek correction of the threatening conditions by recourse to legitimate channels. As a consequence, the prisoner is not only not answerable for his initial escape, he also may remain at large with impunity so long as

the harsh condition that prompted the escape remain unchanged.²⁹

This result is obviously unacceptable from the perspective of the public interest in assuring that convicted offenders remain incarcerated until released by legal processes. More important, the court of appeals' holding is conceptually unsound as an application of the duress defense, because it ignores the settled rule that the defense is only available when there is no reasonable alternative to a violation of the law. Once an inmate has escaped the allegedly life-threatening or intolerable prison conditions, there is no further justification for his remaining at large or for his failure to pursue lawful remedies to eliminate any continuing dangers to his health or safety.

We recognize, of course, that it is both futile and inhumane to insist that an escaped prisoner surrender himself at once to a facility where genuinely dangerous conditions persist merely in order to preserve a defense of duress to the escape. However,

²⁹ It is far from clear from the court of appeals' opinion how an escaped inmate would ever be aware whether the prison conditions that forced his escape have been eliminated during the period of his absence from custody. Here, for example, there was no evidence that respondents made any effort to determine whether the Northeast-1 housing unit continued to suffer fires during the several months following their escape. (It is unlikely that the court intended to require the government to notify an escaped inmate of the changed conditions, because prison officials obviously would not know of his whereabouts; indeed, until the inmate's capture the officials would not even know the particular confinement conditions that purportedly led to his escape).

neither the character of the duress defense nor considerations of the public interest necessarily demands that particular course of action as the exclusive means of fulfilling the return requirement. Where the conditions that led to an escape are of a continuing nature, the prisoner may terminate the escape by surrendering himself to any responsible person, such as a public official or defense counsel, or by procuring the assistance of an intermediary to effect his return to custody under terms that will assure his safety, or by seeking a judicial remedy. As Judge Wilkey observed (Pet. App. 59a), an escaped inmate truly concerned about his well-being if returned to prison "can turn, for example, to the community, to public agencies, to public or private legal services, to politicians, to church groups or other private organizations that are in a position to take the action necessary to protect him from untoward danger once he returns to custody." See also Note, *supra*, 54 Chi.-Kent L. Rev. at 934.³⁰

Only by adducing evidence that these options were unavailable to him—in other words, that there were *no* reasonable alternative means of protecting himself from the dangers that prompted his escape except by remaining at large—should an escaped prisoner be permitted to excuse his continued absence on

³⁰ The district court made the same point in denying a duress instruction: respondents failed to "notif[y] the authorities or the public defender in an effort to surrender under conditions that might have been arranged by the public defender" (App. 219; Tr. 778).

the basis of duress. Respondents, however, never made any effort at trial to justify their continued absence by such a showing. They never turned themselves in, never attempted to turn themselves in, never sought the assistance of an intermediary to arrange for their surrender under conditions that would guarantee their safety, and never alleged that the coercion that purportedly led to their departure from the jail prevented their choosing one of these several alternatives to breaking the law. See *United States v. Michelson*, *supra*, 559 F.2d at 571; *Stewart v. United States*, *supra*, 370 A.2d at 1377.³¹

³¹ Only respondent Walker introduced evidence that, if believed, tended to show some effort to terminate his escape. See pages 6-7, *supra*. By respondent's own admission, however, he received assurances that he would not be harmed by the FBI after his surrender, yet he declined to turn himself in. Although respondent claimed that he balked because the FBI agent refused to give similar assurances that he would not be returned to the District of Columbia Jail, respondent made no attempt to contact any other government official or community group in an effort to obtain that promise as a price for divulging his whereabouts. Instead, after a few telephone calls to the FBI, respondent chose to remain in hiding until he was captured four months later.

We doubt whether respondent Walker's minimal efforts—two or three brief telephone calls to a single FBI agent over a four-month period—satisfied the duty on an escaper, once free, diligently to pursue legitimate means of redress, rather than to pursue self-help through continued criminality. It is unnecessary to decide this question, however, because the evidence respondent presented concerning fires and inadequate medical treatment at the District of Columbia Jail was wholly insufficient to demonstrate that he faced an immediate threat to his health or safety that permitted no alternative but escape.

b. As noted above, although the court of appeals held that satisfaction of a return requirement is not an absolute prerequisite to the assertion of a duress defense, it did agree that escape is a continuing offense and that a defendant must therefore justify his continued absence from custody as well as his initial departure (Pet. App. 27a). Despite this conclusion, the court held that respondents had no obligation to explain their continued absence in *this* case, because the theory of escape as a continuing crime was not reflected in the indictment or in the trial judge's charge to the jury (*id.* at 24a). Instead, the court remarked, respondents "were indicted for 'flee[ing] and escap[ing]' '[o]n or about August 26, 1976,' and the trial court's instructions, rather than explaining a 'continuing offense' concept to the jury, emphasized the notion that the offense took place when [respondents] left the jail on August 26" (*id.* at 25a; footnotes omitted). Judge Wilkey correctly labeled this analysis as "patently frivolous" (*id.* at 61a).

18 U.S.C. 751(a) refers only to attempted or completed "escape"; there is no separate and discrete offense of "failing to return to custody" (Pet. App. 24a-25a). Escape under the federal statute has always been viewed as a single continuing offense that is not complete while the prisoner remains at large.

Consequently, even assuming that respondent Walker's evidence at trial was adequate, if believed, to show compliance with the return requirement, he nonetheless was not entitled to a duress instruction because of his inability to meet the immediacy requirement.

See page 32, note 20, *supra*. The initial departure and the subsequent absence are simply separate aspects of *every* consummated escape, since "[t]he act of absenting oneself from custody necessarily entails not only the initial severance of control but also the maintenance of that status for an appreciable period of time, whether that be one minute or one hour or one year" (Pet. App. 62a; Wilkey, J., dissenting); there is no authority to support the court's bifurcation of these two related acts into two distinct crimes. Respondents' failure to justify their absence from custody during the several months after they had left the jail thus rendered the duress defense unavailable as a matter of law as to the whole crime of escape, not merely as to the artificial "initial" or "subsequent" aspects created by the court below.

It is hardly significant that the indictment specified August 26, 1976, as the date of respondents' "escape" and did not specifically aver that their absence continued for some months thereafter. The date alleged was obviously intended to mark respondent's initial flight from lawful custody, when the crime began, rather than to delimit the duration of the offense. While an absence from custody of some measurable duration is implicit in the crime of escape, the duration itself is not a discrete component of the crime. An averment of the continuing nature of the offense is therefore not essential to the sufficiency of the indictment. See, *e.g.*, *Russell v. United States*, 369 U.S. 749, 763-764 (1962). Indeed, under Section 751 the government is not even required to es-

tablish that the escape occurred at the moment of departure. See *United States v. Spletzer*, *supra*, 535 F.2d at 954. Yet no court that has predicated liability under the federal escape statute on a prisoner's unauthorized absence following an arguably excusable departure from custody has ever suggested that the continued absence aspect of the offense must be separately alleged. See, *e.g.*, *United States v. Michelson*, *supra*, 559 F.2d at 570-571; *United States v. Chapman*, *supra*, 455 F.2d at 749; *Chandler v. United States*, *supra*, 378 F.2d at 908.³²

In any event, as the court below itself recognized (Pet. App. 25a), respondents were indicted for "flee[ing] and escap[ing]" from custody (App. 9-10, 15). The former term connotes an absence of some duration. For example, in the context of 18 U.S.C. 3290, which deprives fugitives of the benefits of the statute of limitations, the phrase "flee from justice" has been construed to mean not only an initial departure from one's usual place of abode, but also a continued concealment for the purpose of avoiding arrest or prosecution. See, *e.g.*, *United States v. Wazney*, 529 F.2d 1287, 1289 (9th Cir. 1976); *Ferebee v. United States*, 295 F. 850, 851 (4th Cir. 1924). Cf. *Streep v. United States*, 160 U.S. 128 (1895). Hence, in-

³² The court of appeals' construction of Section 751(a), if accepted, would require the government to charge virtually every escape under both alternatives of the court's "two crime" analysis in order to avoid the problem that would arise if the defendant attempted at trial to excuse his initial departure on the ground of coercion, mistake, intoxication, or some other defense.

clusion of the term "flee" in the indictment removes any semblance of plausibility from the court's semantic objection that the formal charge failed to encompass the continuing absence aspect of the offense.

Finally, the trial judge's failure to instruct the jury that the escape offense was a continuing one is inconsequential in the circumstances of this case. To begin with, contrary to the court of appeals' apparent assumption, the district court did inform the jury that escape consists of "absent[ing]" oneself from a place of confinement (App. 223; Tr. 802), a term that certainly conveys the continuing nature of the offense. Moreover, respondents never asked the court to inform the jury of the alleged bifurcated feature of the crime; their proposed duress instruction focused exclusively on the initial departure from custody (App. 17). See *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977).³³ This strategy is certainly not surprising since, as we have already discussed, respondents produced absolutely no evidence tending either to show that they surrendered after their escape or otherwise to excuse their continued absence. As a result, respondents would not have benefited even under the court of appeals' "two crime" theory: an explicit instruction that the crime of escape could be committed by respondents' unjustified refusal to return to custody after they had fled from the District

³³ In fact, respondent Walker urged the court of appeals (Br. 42) to "reject the notion that a prisoner who escapes from prison and then remains absent commits not one, but two separate offenses under 18 U.S.C. § 751(a)."

of Columbia Jail would have offered the jury no rational alternative but to return convictions.³⁴

II

THE EVIDENCE OF HARSH PRISON CONDITIONS WAS NOT RELEVANT TO RESPONDENTS' INTENT TO ESCAPE

The court of appeals held that, regardless of whether the evidence of harsh prison conditions presented by respondents was sufficient as a matter of law to make out an affirmative defense of duress, the evidence should have been submitted to the jury because it might have "negated the intent required to commit the crime of escape" (Pet. App. 4a). The court's analysis followed three steps: *first*, the federal escape statute does not create an absolute liability of-

³⁴ As Judge Wilkey explained (Pet. App. 62a; emphasis deleted):

The majority's complaint is that the trial court precluded jury consideration of a duress defense and held as a matter of law that the defense was unavailable. However, the majority concedes that if the court had instructed the jury fully as to the "continuing offense" aspect of escape, then it could properly have held as a matter of law that the duress defense was unavailable and thereby have precluded jury consideration of the defense. Why should the result be different simply because in one case the trial court did not fully illuminate the "continuing offense" aspect of the offense for the jury and in the other case it did? The jury is not making the decision on the availability of the defense in either case; the court is making the decision in both cases as a matter of law. The amount of information conveyed to the jury is therefore irrelevant to the propriety of the trial court's legal decision.

fense, but rather requires proof of criminal intent; *second*, the intent required under the statute is an "intent to avoid confinement"; and *third*, "confinement" in this context refers only to those prison conditions that are "normal" and lawful incidents of incarceration (*id.* at 7a-9a). Hence, in the court's view, "if a prisoner offers evidence to show that he left confinement only to avoid conditions that are not normal aspects of 'confinement'—such as beating in reprisal for testimony in a trial, failure to provide *essential* medical care, or homosexual attacks—the intent element of the crime of escape may not be satisfied" (*id.* at 9a n.17).

The court of appeals' startling reformulation of the crime of escape to require proof of a "specific intent" to avoid "normal" incidents of confinement stems from a fundamental confusion concerning the element of intent. "Intent" in criminal law may be used in three different senses: (1) that the defendant performed the prohibited act deliberately, not accidentally or unconsciously; (2) that the defendant knew the act was wrongful; or (3) that the defendant did the act to further some ultimate goal. See W. LaFave & A. Scott, *supra*, § 28; *United States v. Cullen*, 454 F.2d 386, 390 (7th Cir. 1971). The first use is the narrowest, requiring merely that the *actus reus* be voluntary.³⁵ The second use implies

³⁵ The "intent" present here is minimal. Indeed, some commentators have included the concept of voluntariness in the definition of an "act," thus shading the *actus reus* into the *mens rea*. See R. Perkins, *supra*, at 749; W. LaFave & A. Scott, *supra*, § 25 at 179-180.

the additional element of *mens rea*, or consciousness of wrongdoing. See *United States v. United States Gypsum Co.*, 438 U.S. 422, 436-437 (1978). Intent of the third type requires a showing that the defendant had a specific purpose or motive in performing the wrongful act. This type is referred to as "specific intent."³⁶

The mental element required by the common law concept of the crime of escape and incorporated into 18 U.S.C. 751(a), the federal escape statute, is of the second type, requiring consciousness of wrongdoing but not proof of some ultimate goal. The evidence at trial showed beyond a reasonable doubt that respondents acted with this "general intent" when they left the District of Columbia Jail. Respondents did not dispute that they knew that they were in custody at the jail, that their actions would remove them from the physical confines of the jail, and that they had not received permission to depart. Proof of harsh conditions at the jail could not have negated this intent. The district court therefore properly charged the jury on the issue of intent and properly refused to allow the evidence of fires, threats and assaults to be considered on that issue.³⁷

³⁶ A "specific intent" offense requires proof of "some specialized knowledge or design for some evil beyond the common-law intent to do injury." *Morissette v. United States*, 342 U.S. 246, 265 (1952). See *Williams v. United States*, 341 U.S. 97, 102 & n.* (1951); *Screws v. United States*, 325 U.S. 91, 101-102 (1945); W. LaFave & A. Scott, *supra*, § 28 at 202.

³⁷ The trial judge instructed the jury as follows (App. 221; Tr. 799):

Now, ladies and gentlemen, I wish to instruct you about a concept we call intent. It is important in any

A. The District Court Correctly Held That Escape Under 18 U.S.C. 751(a) is a General Intent Crime

1. At common law, the offense of escape consisted simply of a prisoner's unauthorized departure from lawful custody.

An escape is committed whenever by any unlawful means a criminal in lawful custody voluntarily leaves and gains his liberty before he is delivered in the due course of the law.

3 *Wharton's Criminal Law and Procedure* § 1367 at 758 (1957). See also 1 W. Burdick, *supra*, § 307 at 462; 1 M. Hale, *supra*, at 608. The actus reus of the offense was the physical act of leaving the place of confinement, and the intent required to commit the crime was a general one. "No state of mind is re-

criminal case.

Intent means that a person had the purpose to do a thing. It means that he made an act of the will to do the thing. It means the thing was done consciously and voluntarily and not inadvertently or accidentally.

Some criminal offenses require only general intent, and that is true, ladies and gentlemen, of the offenses charged in this case.

Where this is so, and it is shown that a person has knowingly committed an act which the law makes a crime, intent may be inferred from the doing of the act.

Respondents objected to this instruction at trial and in the court below because it did not require the jury to find that they left the jail with an intent to avoid confinement *permanently* (see Pet. App. 85a (Wilkey, J., dissenting); Brief for Appellant Bailey 16). The court of appeals held that the district court correctly rejected this "extreme interpretation" of the escape statute (Pet. App. 9a n.17).

quired for guilt of escape other than the intent to go beyond permitted limits * * *." R. Perkins, *supra*, at 504. "The voluntary act of leaving lawful custody, without permission of law, is sufficient to constitute the general criminal intent required * * *." 1 W. Burdick, *supra*, § 311 at 467. See 3 *Wharton's, supra*, § 1367 at 764 ("The ordinary intent required to constitute the offense of escape * * * is the intent to do the act voluntarily * * *"); Gardner, *supra*, 49 S. Cal. L. Rev. at 124 n.81; *Model Penal Code* § 208.33 at 136, Comment (Tent. Draft No. 8, 1958).³⁸

³⁸ Accord, *State v. Morton*, 293 A.2d 775, 779 (Me. 1972); *State v. White*, 16 Ariz. App. 514, 494 P.2d 714, 717 (1972); *Alex v. State*, 484 P.2d 677, 679 (Alaska 1971); *People v. Spalding*, 17 Mich. App. 73, 169 N.W.2d 163, 165 (1969); *State v. Marks*, 92 Idaho 368, 442 P.2d 778, 780 (1968); *People v. Goldman*, 245 Cal. App. 2d 376, 383, 53 Cal. Rptr. 810 (1966); *State v. Wharff*, 257 Iowa 871, 134 N.W.2d 922, 925 (1965); *Wiggins v. State*, 194 Ind. 118, 141 N.E. 56, 57 (1923); *State v. Clark*, 32 Nev. 145, 104 P. 593, 594-595 (1909). See also *State v. Reese*, 272 N.W.2d 863, 865 (Iowa 1978); *State v. Liggett*, 363 S.2d 1184, 1186 (La. 1978); *State v. Boleyn, supra*, 328 S.2d at 98; and *People v. Noble*, 18 Mich. App. 300, 170 N.W.2d 916, 918 (1969), where the courts construed state escape statutes, which follow the common law formulation, to require only a general intent to depart.

In *Gallegos v. People*, 159 Colo. 379, 387, 411 P.2d 956, 960-961 (1966), the court held that the mental element of the escape offense requires an "intent of the accused to evade the due course of justice." See also *Cassady v. State*, 247 Ark. 690, 447 S.W.2d 144, 145 (1969); *State v. Hendrick*, 164 N.W.2d 57, 63 (N.D. 1969). While the court labeled this a "specific intent" requirement, in the absence of further explanation it does not appear that it entails anything more

The "general intent" element of the escape offense would thus absolve an inmate who left the confines of the prison while sleepwalking, or under a reasonable mistake concerning the boundaries of the prison grounds, or on the misimpression that he had been lawfully authorized to depart. See, e.g., *People v. Weiseman*, 280 N.Y. 385, 21 N.E.2d 362 (1939); *State v. Pace*, 192 N.C. 780, 136 S.E. 11 (1926). See also *Ammidon v. Smith*, 14 U.S. (1 Wheat.) 447, 459 (1816). By contrast, however, "if a prisoner knows that he has no authority to leave prison and, whatever his motivation, still departs prison, with the purpose of departing, he has acted with the requisite intent" (Pet. App. 75a (Wilkey, J., dissenting); footnote omitted and emphasis deleted). In other words, escape at common law has always been considered only a "general intent" crime; "a specific intent is not required, in the absence of any statutory provision to the contrary." 1 W. Burdick, *supra*, § 311 at 467.³⁹

than an intent to depart lawful custody, that is, a general intent to commit the crime. In any event, these cases lend no support to the court of appeals' novel formulation of the intent requirement under the federal escape statute.

³⁹ It is hardly surprising that the law of escape developed in this fashion. Crimes that require a "specific intent" are designed to combat discrete evils that relate to the defendant's motivation and not just his physical acts. For example, misstatements made with an intent to defraud, or seizures made with an intent to deprive the owner of his property permanently, present dangers to society far beyond those threatened by negligent misstatements or the temporary removal of a chattel. Hence, the false pretenses and larceny laws require proof of the defendant's motive, or specific intent, to bring about the greater evil. See W. LaFave & A. Scott, *supra*, § 28

2. Nothing in the language of the federal escape statute reflects an intent to alter the common law elements of the offense. Section 751(a) speaks in the broadest terms in prohibiting "escape from * * * custody." The word "escape" is unqualified, and undefined terms in a statute are presumed to possess their common law meaning in the absence of legislative history to the contrary. See 2A A. Sutherland, *Statutes and Statutory Construction* § 48.18 at 224, § 50.03 at 227-228 (4th ed. 1973); *Morissette v. United States*, *supra*, 342 U.S. at 263. This is especially true in interpreting criminal statutes. *United States v. Turley*, 352 U.S. 407, 411-412 (1957).

The background of the federal escape statute, far from shedding no light on the matter, demonstrates quite clearly that Congress did not intend to depart from the traditional standards. The first bill to deal with the problem of escapes from federal custody was introduced in the House of Representatives in 1928.

at 202. Similarly, the federal civil rights laws (18 U.S.C. 241, 242) are intended to prevent deprivations of constitutional rights, not injuries caused under color of state law generally, and they therefore require proof that the defendant acted for the purpose of depriving a citizen of the enjoyment of those rights. With escape statutes, the design quite clearly is to protect the safety of the public and correctional officials and to preserve prison discipline by preventing persons convicted of crimes and placed in custody from knowingly removing themselves from the physical confines of that custody without permission, whatever the reason for the unauthorized departure. The potential dangers from a prison escape are the same regardless of the escaper's motivation. As a result, the law rightly has never made commission of the escape offense dependent upon proof of that motivation.

H.R. 9021, 70th Cong., 1st Sess. The proposed legislation provided that

if any person convicted of an offense against Federal statutes, committed to any Federal penal or correctional institution * * * shall break such prison and escape therefrom * * * such person shall be deemed guilty of escape. * * *

69 Cong. Rec. 1568 (1928). After passage in the House, however, the bill was amended by the Senate Judiciary Committee to require that the departure from prison be committed "with intent to escape from custody." S. Rep. No. 1505, 70th Cong., 2d Sess. 1 (1929). The bill was reported to the Senate floor in this amended form, but it failed to win approval. 70 Cong. Rec. 2981 (1929).

Legislation to prohibit escapes was again introduced in the House in the following year. The new proposal was based upon the earlier House bill and entirely omitted the Senate amendment concerning intent. H.R. 7832, 71st Cong., 2d Sess. § 9 (1930). See H.R. Rep. No. 106, 71st Cong., 2d Sess. 3 (1930); S. Rep. No. 533, 71st Cong., 2d Sess. 3 (1930). It broadly punished "[a]ny person * * * who is confined in any penal or correctional institution, pursuant to the direction of the Attorney General, who escapes or attempts to escape therefrom * * *." This version, from which 18 U.S.C. 751 is derived, was subsequently adopted by both houses without debate and enacted into law. Act of May 14, 1930, ch. 274, Section 9, 46 Stat. 327. See *Federal Prisoners and Penitentiaries: Hearings on H.R.*

7832 Before the House Comm. on the Judiciary, 71st Cong., 2d Sess. 29 (1929); 72 Cong. Rec. 989, 1138, 2157-2158, 2179-2180, 7691, 8575-8576, 8705 (1930).

The legislative history thus indicates that Congress was presented with a proposal to adopt an escape statute containing a stricter intent requirement than that imposed by the common law. While the Senate Judiciary Committee amendment is not free of ambiguity, it unquestionably would have required proof of more than a mere knowing and voluntary departure from confinement, or else the added language would have been surplusage. Congress rejected this amendment, however, and instead enacted legislation that outlawed all "escapes" without addressing the mental element required. This decision strongly suggests that Congress desired to retain the common law formulation of the crime. See also note 39, *supra*.

3. The lower federal courts have consistently construed the escape statute to require only a general intent to depart from the boundaries of lawful custody. No court, until the decision in this case, has even intimated that the defendant's motivation is an element of the crime under Section 751(a). See *United States v. Jones*, 569 F.2d 499, 500, 501 n.3 (9th Cir.), cert. denied, 436 U.S. 908 (1978); *United States v. Cluck*, *supra*, 542 F.2d at 731 n.2; *United States v. McCray*, 468 F.2d 446, 448 (10th Cir. 1972); *United States v. Woodring*, *supra*, 464 F.2d at 1251; *United States v. Chapman*, *supra*, 455 F.2d

at 749; *Chandler v. United States*, *supra*, 378 F.2d at 908.

Against all of this, the sole support offered by the court of appeals for the proposition that escape is a "specific intent" offense is *United States v. Nix*, 501 F.2d 516 (7th Cir. 1974). *Nix* involved two defendants, Nix and Peterson, who were inmates in the United States Penitentiary at Marion, Illinois. Peterson was charged with escape from the prison, while Nix was charged with attempted escape. Each defendant claimed that he was "roaring drunk" at the time of the offense. Since all attempt crimes require proof of a "specific intent" (see 1 W. Burdick, *supra*, § 139 at 180), Nix claimed that he was entitled to an instruction that the intent element of the crime could be negated by his intoxication. Peterson argued that escape should also be considered a "specific intent" offense and that he was therefore entitled to an intoxication instruction as well.

The Seventh Circuit acknowledged that there was scarce authority for Peterson's "specific intent" argument (501 F.2d at 517), but it concluded that "[w]henver intoxication * * * is raised as a mitigating factor, use of the 'specific' and 'general' intent labels interferes with the crucial analysis a court should make in escape cases: what constitutes the 'escape' element of the crime?" (*id.* at 518). The court said that escape required proof of some mental element and defined the element as "an intent to avoid confinement." It then stated that, "[w]hatsoever label is placed on this intent, a defendant under

§ 751 is entitled to an instruction that includes this mental component as an element of the crime * * *. If the defendant offers evidence that he was intoxicated at the time of the offense, the jury must be instructed to consider whether he was so intoxicated he could not form an intent to escape" (*id.* at 519-520; footnote omitted).

Contrary to the court of appeals' contention in this case, *Nix* thus held only that intoxication is a defense to escape under Section 751 regardless of whether the offense requires proof of a "general" or "specific" intent.⁴⁰ Like Judge Wilkey (Pet. App. 80a), we have little quarrel with this ruling, since proof that a defendant left the prison while intoxicated would fail

⁴⁰ Judge Pell's dissenting opinion in *Nix* confirms that the court's focus was on the availability of the intoxication defense in escape cases rather than on whether escape is a "general" or "specific" intent crime (501 F.2d at 520):

The only close aspect that I find in this case is that part of the court's instructions to the effect that if the defendant acted or failed to act because of intoxication it was not a defense. I do not quarrel, nor do I understand that the majority does, with the immediately preceding statement in the charge that the crime does not involve specific intent. I would accept the majority standard that escape is a voluntary departure from custody with an intent to avoid confinement.

At one point in the *Nix* opinion (*id.* at 518), the court of appeals stated that its reasoning would be equally applicable if a defendant raised "coercion or mistake," rather than intoxication, as a defense to escape. This assertion, which was of course unnecessary to the court's decision, was not otherwise explained. We believe that the statement is incorrect for the reasons stated below (see pages 62-64, *infra*).

to satisfy the mens rea element of the offense. See W. LaFave & A. Scott, *supra*, § 45 at 343-344. Indeed, the "intent to avoid confinement" that the Seventh Circuit held must be shown in escape cases would appear to be only a "general intent" requirement, since that mental element, one supposes, would be conclusively proven in every case by evidence that an inmate knowingly left the physical confines of the prison without permission. Nothing in the phrase suggests that an inmate must have acted with any ultimate motive or purpose in leaving custody, much less lends any support to the court of appeals' holding that the escape statute requires the government to prove a "specific intent" to escape from "normal" conditions of confinement (Pet. App. 9a n.17). See *United States v. Spletzer*, *supra*, 535 F.2d at 953-954.

4. It follows from the conclusion that escape is a "general intent" crime that the evidence respondents introduced to explain why they left the District of Columbia Jail was irrelevant to the issue of intent. The criminal law recognizes two types of defenses. One kind "negative[s] guilt by cancelling out the existence of some required element of the crime," either the actus reus or the intent element. W. LaFave & A. Scott, *supra*, § 8 at 46-47. Mistake of fact, insanity, and (as the court held in *Nix*) intoxication, for example, are defenses designed to establish that the accused did not have the mental state required to commit the offense. However, certain other defenses, such as self-defense, operate on an entirely

different principle. They "do not negative any of the elements of the crime but instead go to show some matter of justification or excuse which is a bar to the imposition of criminal liability." *Id.* at 47.

Defenses based on coercion or "choice of evils" have always been viewed as among the latter type, because they do not entail an absence of mens rea and hence do not negate a general criminal intent. "When a person commits a crime under compulsion, although his choices are limited, he still has the requisite intent to commit the criminal act." 43 U. Cin. L. Rev. at 961 n.31. As noted above (see pages 21-23, *supra*), the rationale for defenses such as duress or necessity is not that the defendant, confronted with imminent, serious harm, does not "intend" to do what he does, but rather that, although he has the mental state that the crime requires, he has made the most socially useful choice and should be excused from criminal responsibility. See W. LaFave & A. Scott, *supra*, § 49 at 374, § 50 at 382. In such a situation, "the accused has intended the criminal act, under any usual meaning of the word 'intention.' * * * The fact that the accused does not really desire the consequences for their own sake, but does desire them as a means of escape from imminent peril, is not relevant to this point, as desire is not a necessary part of intention." Wasik, *Duress and Criminal Responsibility*, 1977 Crim. L. Rev. 453, 455.⁴¹ Thus, as

⁴¹ If the rule were otherwise—that is, if duress operated to negate criminal intent—it would be difficult to explain many of the traditional limitations on the "choice of evils"

Judge Wilkey pointed out (Pet. App. 75a; emphasis deleted):

[I]f a prisoner leaves prison to visit his dying mother with the intent to return to prison, he has nevertheless "intended" to depart prison and he is therefore guilty of escape; it was still his purpose to avoid confinement, if only for a brief time. Similarly, if a prisoner is forced to leave prison at gunpoint, his "intent" is not negated. It was still his purpose to depart from custody; he may not have desired to leave, but he still intended to.

By the same token, the evidence of fires, threats and assaults offered by respondents, while perhaps accounting for their decision to flee from custody, could not negate their general intent to avoid confinement. There is no doubt that respondents consciously and deliberately left the District of Columbia Jail and that they were aware of the nature of their

defense, such as the inapplicability of the defense to the charge of murder. See W. LaFave & A. Scott, *supra*, § 49 at 374 n.3; Pet. App. 83a n.92 (Wilkey, J., dissenting). The only authority cited by the court of appeals for its assertion that duress, "like the defenses of intoxication, insanity, and mistake, negates the intent * * * element[] of an offense," is the table of contents of the draft *Model Penal Code* (Pet. App. 17a-18a & n.31). Nowhere in the commentary of the Code, however, is it suggested that compulsion exculpates through the negation of intent. More important, the Code labels "duress" as an "affirmative defense" (*Model Penal Code* § 2.09 (Proposed Official Draft, 1962)), whereas it states that defenses such as mistake (*id.* at § 2.04) and intoxication (*id.* at § 2.08) operate to negate the mental element of the offense.

actions. The court of appeals did not dispute this and, indeed, respondents have never contended otherwise. This, as we have shown, is all that is required to establish the intent element of the escape offense under 18 U.S.C. 751(a). Accordingly, even assuming that respondents' evidence of harsh prison conditions tended to show overwhelming compulsion, it still could not have served to prove that they acted without mens rea. The district court therefore correctly refused to allow the jury to consider the evidence for its bearing on respondents' intent to escape.⁴²

⁴² For much the same reasons, there is no substance to the court of appeals' suggestion that the evidence of threats and fires was relevant to the "voluntariness" of respondents' actions (Pet. App. 10a, 17a). The requirement of "voluntariness" means that the actus reus was the product of the defendant's free will. See, e.g., *Model Penal Code* § 2.01 (Tent. Draft No. 4, 1955); R. Perkins, *supra*, at 749; 1 W. Burdick, *supra*, §§ 198-199 at 260-262. Issues of voluntariness must be raised within the framework of the defense of duress, which has been fashioned precisely for dealing with the issue of free will. See Newman & Weitzer, *supra*, 30 S. Cal. L. Rev. at 313-314. "[T]he positive law that defines where free will ends and exculpating compulsion begins is embodied in the duress defense and *no where else*" (Pet. App. 69a; Wilkey, J., dissenting). Thus, if, as we contend, respondents' evidence of improper conditions at the District of Columbia Jail was insufficient as a matter of law to establish a choice-of-evils defense, the trial judge was not obliged nonetheless to allow the jury to consider the evidence on the issue of "voluntariness." Judge Wilkey has persuasively exposed the dangers of the standardless approach advocated by the court majority. See *id.* at 70a-73a & n.68.

B. The Court of Appeals' Holding That The Federal Escape Statute Requires Proof of a "Specific Intent" to Avoid "Normal" Aspects of Confinement Will Cause Significant Problems in Escape Cases

In the court of appeals' view, the "intent to avoid confinement" required under 18 U.S.C. 751(a) is not the general intent to go beyond permitted limits, as the district court charged the jury, but rather must be defined by reference to the nature of prison conditions (Pet. App. 9a n.17):

The word "confinement" describes the most common form of punishment prescribed by our legal system. Jurors are readily aware that a person serving a sentence for a crime is "confined"—i.e., his liberty is restricted—in certain fundamental ways. For example, he cannot leave the institution wherein he is confined, he cannot come and go as he pleases, his daily schedule is subject to various controls, his privacy is substantially curtailed, and he is subject to strict discipline. * * * [I]f a prisoner offers evidence to show that he left confinement *only* to avoid conditions that are not normal aspects of "confinement"—such as beating in reprisal for testimony in a trial, failure to provide *essential* medical care, or 'homosexual attacks—the intent element of the crime of escape may not be satisfied.

Hence, said the court, when a defendant introduces evidence that he was subject to such "non-confinement" conditions, "the crucial factual determination on the intent issue is thus whether the defendant left custody only to avoid these conditions or whether, in

addition, the defendant also intended to avoid confinement. In making this determination the jury is to be guided by the trial court's instructions pointing out those factors that are most indicative of the presence or absence of an intent to avoid confinement" (*ibid.*).

This holding contains the seeds of substantial mischief. It permits the introduction of evidence tending to demonstrate harsh and improper confinement conditions and permits exculpation on the basis of lack of "specific intent" to escape whenever the jury finds that such conditions are not "normal" aspects of confinement and that the unauthorized departure was prompted by them. By thus confusing coercion with lack of intent, the court has eliminated any need for an escape defendant to demonstrate that the circumstances that compelled his departure constituted an imminent and substantial threat to his life or health, that legitimate alternatives to the escape were unavailable or unavailing, or that his unlawful activity ceased at the earliest possible moment through surrender to proper authority.

The initial problem with the court of appeals' opinion is that it is totally devoid of standards to assist the jury in distinguishing between "normal" confinement conditions, which presumably must be stoically endured, and those that are "abnormal," which may lawfully be avoided by departure from custody because they somehow are sufficient to negate the intent to escape. The legitimacy of prison practices is often a difficult question for lawyers and

judges to agree upon (see, e.g., *Bell v. Wolfish*, No. 77-1829 (May 14, 1979), slip op. 40-41), let alone for laymen. The lack of standards invites in virtually every escape prosecution the introduction of evidence of every conceivable unpleasantness that may exist within the prison. As a result, it is reasonable to forecast that escape trials will become wide-ranging investigations into the acceptability or normality of prison conditions, rather than a means of enforcing lawfully imposed criminal sentences. The defendant's opportunity to divert the focus of the jury's attention from the question of his culpability to that of the penal system's adequacy will obfuscate what should be the central issue at such a trial.

The very ambiguity created under the court of appeals' analysis also will increase the already powerful incentives for prisoners to attempt to escape. As noted above, the court's ruling frees inmates from having to satisfy the stringent objective criteria that have heretofore minimized the availability of the duress defense in escape cases. Given the presence of arguably intolerable conditions in any prison environment, every sophisticated inmate captured after an escape will defend by claiming that these "non-confinement" conditions led to his departure.⁴³ Even

⁴³ This problem is exacerbated by the court of appeals' holding that, once the defendant presents evidence of severe confinement conditions and claims that they induced his flight, it becomes the government's burden to establish beyond a reasonable doubt that the escape was instead motivated by a desire to avoid "normal" aspects of confinement. Of course, as Judge Wilkey pointed out (Pet. App. 89a), "even though

if the defense proves unsuccessful, the increased number of escapes will mean an increased level of tension within the prison system, an increased disruption of prison discipline, and an increased danger of injury to correctional personnel and the public. See *United States v. Brown*, *supra*, 333 U.S. at 21 n.5; Note, *supra*, 54 Chi.-Kent L. Rev. at 939-940.⁴⁴

Moreover, the court of appeals' "specific intent" requirement will allow juries an essentially unfettered discretion to decide what confinement conditions

a prisoner's primary or sole purpose is to avoid 'non-confinement conditions,' he can only do so—and he knows he can only do so—by avoiding legitimate confinement conditions as well." The majority did not disagree with this observation, for indeed it is unanswerable. The court's test thus must contemplate that the government cannot meet its burden merely by showing that the defendant knowingly departed from lawful custody. It instead will require the prosecutor to disprove the defendant's own testimony concerning his motivations for escaping, a task not easily accomplished, or to establish that the conditions allegedly prompting the departure did not fall below the court's undefined minimal standards. (Indeed, since it is the defendant's "intent"—that is, his *belief* that conditions are abnormal—that eliminates criminal liability under the majority's view, it might not be sufficient merely to show that conditions in a prison are legitimate. The government might be forced to prove that the defendant did not believe they were illegitimate.)

⁴⁴ It is for these reasons that the courts have heretofore consistently held that prison conditions alone cannot excuse or justify an escape. See, e.g., *Dempsey v. United States*, 283 F.2d 934 (5th Cir. 1960); *State v. King*, 372 S.W.2d 857, 859 (Mo. 1963); *State v. Palmer*, 45 Del. 308, 72 A.2d 442 (1950); *People v. Whipple*, 100 Cal. App. 261, 279 P. 1008 (1927); 37 Mo. L. Rev. at 555; Annot., *supra*, 69 A.L.R. 3d at 689-692.

are sufficiently inadequate to warrant escape. After the wide range of evidence permitted by the court's opinion has been received (Pet. App. 15a; footnote omitted),

the proper approach is to inform the jury of those considerations that are relevant to its deliberations, not to take the issue out of its hands. In our view allowing the jury to perform its accustomed role in escape cases may make those responsible for prison conditions more conscious of their responsibilities and may well lead to fewer, rather than more, escapes.

In other words, under the guise of allowing the jury to perform its "accustomed role in escape cases," a phrase the court does not otherwise elaborate upon, juries would be empowered to dictate to prison administrators the conditions of confinement that are "normal" and appropriate and that must be maintained to make escape unlawful.⁴⁵ The effect of an acquittal would be an unreviewable determination that the conditions in a particular institution are so oppressive that they justified the departure, not only of the defendant, but also (one would suppose) of all other inmates in the institution as well. See Gardner,

⁴⁵ The majority's assumption that its reformulation of the escape offense will act as a spur to penal reform is fanciful. Even assuming that escape prosecutions, rather than civil injunctive or damage actions, are a proper means of improving prison conditions, prison officials often will have no way of knowing after an acquittal what the jury found to be the "non-confinement" condition that justified the escape.

supra, 49 S. Cal. L. Rev. at 139-149. It goes without saying that this result is unacceptable.⁴⁶

Federal prisoners have at their disposal an inmate grievance procedure through which they may inform correctional authorities of their complaints about prison conditions and may secure complete remedial action. See page 36, note 23, *supra*. In addition, when administrative procedures prove ineffective, "persons in prison * * * have the right to petition the Government for redress of grievances which, of course, includes 'access of prisoners to the courts for the purpose of presenting their complaints.'" *Cruz v. Beto*, 405 U.S. 319, 321 (1972), citing *Johnson v. Avery*, 393 U.S. 483, 485 (1969). We submit that these established and orderly methods of dispute resolution, not the self-help remedy of escape sanctioned by the court of appeals, should be the ex-

⁴⁶ The result is also at odds with this Court's frequent admonition that the courts must accord great deference to the professional judgments of prison administrators in assessing the propriety of conditions of confinement. See *Bell v. Wolfish*, *supra*, slip op. 19 n.23, 40-41; *Jones v. North Carolina Prisoners' Labor Union*, *supra*, 433 U.S. at 126. Indeed, the consequences of the court of appeals' opinion are even more drastic than they might seem at first blush. Correctional officials can alter formal confinement conditions if a jury finds that they warrant escape. But the court below would also allow an inmate to offer a "specific intent" defense to an escape charge where, as in this case, the harsh conditions were at least in part caused by other inmates. Most prison escape cases have involved claims of threats or force by fellow prisoners rather than institutional dangers caused by the decisions of correctional officials.

clusive avenue for the relief of whatever improper conditions exist within our nation's penal institutions.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

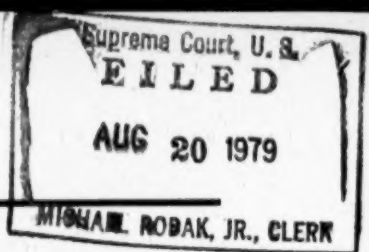
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-990

UNITED STATES OF AMERICA,
Petitioner,
v.
CLIFFORD BAILEY ET AL.,
Respondents.

UNITED STATES OF AMERICA,
Petitioner,
v.
JAMES T. COGDELL,
Respondent.

**On Writ of Certiorari to the United States Court of
Appeals for the District of Columbia Circuit**

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BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals in the principal case, *United States v. Bailey et al.*, appears in the appendix to the petition (Pet. App. 1a-91a) and is reported at 585 F.2d 1087; the opinion of the court of appeals in the companion case, *United States v. Cogdell* (Pet. App. 100a-113a), is reported at 585 F.2d 1130.

QUESTIONS PRESENTED

The questions in this case all relate to the proper construction and application of the principal provision of the federal escape laws, 18 U.S.C. § 751(a). The questions are:

(1) Whether failure to return to custody acts as an absolute bar to the defense of duress or necessity in an escape prosecution, or whether failure to return to custody is merely a relevant factor for the jury to consider in assessing that defense.

(2) Whether a conviction for escape may be sustained, after the trial judge refused instructions on the defense of duress or necessity, on a theory that defendants were nevertheless guilty on a theory of escape as a continuing offense, when that theory was reflected neither in the indictment nor the instructions.

(3) Whether escape is a "continuing offense" that may be committed by the act or omission of failing to

return or to report to custody after an unauthorized departure from custody.

(4) Whether instructions on the defense of duress or necessity were properly denied in these particular prosecutions for escape, because defendants failed to put on or proffer adequate evidence of threats and other intolerable conditions of confinement.

(5) Whether a prisoner who leaves custody without authorization in order to avoid threats and conditions of confinement that threaten his personal safety lacks the requisite state of mind to support a conviction for escape.

STATUTE INVOLVED

18 U.S.C. § 751(a), the principal provision of the federal escape laws in Chapter 35 of Title 18, provides:

"Whoever escapes or attempts to escape from the custody of the Attorney General or his authorized representative, or from any institution or facility in which he is confined by direction of the Attorney General, or from any custody under or by virtue of any process issued under the laws of the United States by any court, judge, or magistrate, or from the custody of an officer or employee of the United States pursuant to lawful arrest, shall, if the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense, be fined not more than \$5,000 or imprisoned not more than five years, or both; or if the custody or confinement is for

extradition or by virtue of an arrest or charge of or for a misdemeanor, and prior to conviction, be fined not more than \$1,000 or imprisoned not more than one year, or both." Act of June 25, 1948, c. 645, § 1, 62 Stat. 734; as amended, Act of Dec. 30, 1963, Pub. L. 88-251, § 1, 77 Stat. 834; Act of Sept. 10, 1965, Pub. L. 89-176, § 3, 79 Stat. 675; Act of Oct. 17, 1968, Pub. L. 90-578, § 301(a)(3), 82 Stat. 1115.

STATEMENT OF THE CASE

A. Introduction

Respondents Clifford Bailey, Ronald Cooley, Ralph Walker,¹ and James T. Cogdell were convicted of escape in violation of 18 U.S.C. § 751(a), after a jury trial (for Bailey, Cooley, and Walker) on March 8, 9, 10, 11, and 14, 1977, and a jury trial (for Cogdell) on May 9 and 10, 1977.² Each was sentenced to five

¹ The name of this defendant, by the time of trial, was Ralph Walker-El, and the transcript occasionally reflects the name change. Since he was indicted as Ralph Walker and is referred to most often in the transcript by that name (and throughout the Government's brief), we have used the shorter form of his name to avoid confusion.

² Bailey and Walker were serving federal sentences at Leavenworth, Kansas, and had been transferred to the D.C. Jail pursuant to writs of habeas corpus ad testificandum issued by the Superior Court of the District of Columbia. Cooley had been committed to the custody of the Attorney General on May 20, 1976, following his conviction in the U.S. District Court for the

years' imprisonment, to be served consecutively to sentences previously imposed, subject to the immediate parole eligibility provisions of 18 U.S.C. § 4205(b)(2).

All four respondents had escaped, to use the term colloquially, from the New Detention Center of the District of Columbia Jail during the early morning hours of August 26, 1976. Although the Government never attempted to prove that respondents escaped together, they were jointly indicted on November 23, 1976, each for escape in violation of 18 U.S.C. § 751(a) and for escape in violation of 22 D.C. Code § 2601 (1973) (App. 9). Apart from differing language attributable to the nature of Cogdell's custody, not germane here, the language of the counts was identical for each respondent.³

District of Columbia for possession of an unregistered firearm and was still awaiting transfer out of the D.C. Jail. Cogdell had been transferred to the District of Columbia Jail from the Fairfax County Jail in Virginia pursuant to a writ of habeas corpus ad prosequendum.

³ "[First, Second, and Fourth Counts:]

"On or about August 26, 1976, within the District of Columbia, [respondent Bailey/Cooley/Walker], having been lawfully committed to the custody of the Attorney General * * * did unlawfully and wilfully flee and escape from such custody.

"[Third Count:]

"On or about August 26, 1976, within the District of Columbia, [respondent Cogdell], * * * having been in the [sic] custody under and by virtue of a commitment issued

On the day set for trial, March 8, 1977, Cogdell's counsel was unable to appear, and Cogdell's case was severed from that of the other three. Trial proceeded against respondents Bailey, Cooley, and Walker.

B. RESPONDENTS BAILEY, COOLEY, AND WALKER

1. The Government's Case-in-Chief

The Government's case-in-chief was exceedingly brief. Documentary evidence was introduced to prove that respondents were in the custody of the Attorney

under the laws of the United States by a Judge of the Superior Court of the District of Columbia * * *, *did unlawfully and wilfully flee and escape from such custody.*

(Violation of Title 18, U.S. Code, Section 751(a))

"[Fifth through Eighth Counts:]

"*On or about August 26, 1976, within the District of Columbia, [each respondent] having been committed to a penal institution of the District of Columbia, did escape therefrom and from the custody of an officer thereof.*

(Violation of Title 22, D.C. Code, Section 2601)" (Emphasis added.)

Significantly, the counts under § 751(a) charged the respondents with "wilfully" fleeing and escaping, while the counts under § 2601 charged them simply with escaping. The four counts charging violation of the local statute have dropped out of the case. The jury was instructed not to consider the local charge if it found any respondent guilty under the federal escape statute. (See App. 224; Tr. 804.)

General at the time of the escapes. Calling no eye-witnesses to the escape, the Government introduced an "Escape and Apprehension Report" for each respondent, prepared when the escapes were discovered (Government Exhibits 4-A, 5-A, 6-A). Each of these, filed on August 26, 1976, reflected a time of escape for the respondent of 5:35 a.m. (see App. 22; Tr. 24-25), and each contained a statement that read:

"Subject went into a cell that has access to the outside, and escaped through a low level window, which had a bar removed by cutting under frame. Subject lowered himself by use of a rope fashioned from a bed sheet."

An employee of the D.C. Department of Corrections testified in addition that the files of the respondents did not reflect permission to leave the New Detention Facility, as the files would have, had such permission been granted (App. 23-24; Tr. 27-28). Finally, an FBI agent testified that respondents had been apprehended in the District of Columbia on November 19 (Bailey), September 27 (Cooley), and December 13, 1976 (Walker) (App. 27-28; Tr. 65-66).

2. The Defense Evidence

In the defendants' case, it was brought out that all three defendants had been confined in that section of the New Detention Center of the D.C. Jail known as "Northeast One" (the northeast section of the first floor), a maximum security section for the confinement "of people on protected custody, incorrigibles

and escapees." (See App. 39; Tr. 158, 197.) It was a "dead lock" section of the jail, where inmates were confined in individual cells and not permitted out except for showers, medical treatment, or other special trips, on all of which they are escorted by correctional officers and kept in handcuffs and leg irons (App. 39-41, 160-61; Tr. 158-161, 541-43). Certain of the cells had no windows (App. 97; Tr. 372). Respondents did not dispute that they had left the jail without permission. They presented the defense of duress or necessity, based in whole or in part on the conditions in that section. The conditions and occurrences which allegedly forced them to escape included smoke inhalation from repeated fires set in the section, threats and assaults by correctional officers, and, for Walker in particular, failure to treat him adequately for his susceptibility to epileptic seizures. In addition to the three respondents, ten witnesses testified for the defense, though testimony about the conditions of confinement in Northeast One and related occurrences came primarily from the respondents and four fellow inmates.⁴ We have summarized below the principal features of the defense evidence.⁵

⁴ Bernard Wilson, Oliver Boling, Garland Hines, and Thomas Robinson.

⁵ Since the defense was not permitted to go to the jury and, accordingly, only the evidence favorable to that defense is relevant, we have not attempted, like the Government and the dissenting opinion below, to summarize the testimony unfavorable to the defense. It was for the jury to assess the credibility of the witnesses for the defense and draw reasonable inferences from that testimony.

(a) *Evidence of fires and smoke.* There was testimony that during the period that respondents were confined in Northeast One fires were regularly set in the section, "every day" (App. 34, 35, 100; Tr. 150, 152, 377); "almost every day" (App. 107; Tr. 390); or "at least two every week" (App. 87; Tr. 353-54). Respondent Bailey testified that the side of his face was burned in one such fire (App. 163; Tr. 546), but the more common difficulty was smoke inhalation endangering inmates' lives and making them sick (App. 45, 124-25; Tr. 168, 415). Several witnesses testified that the fires lasted as long as an hour (App. 96, 100, 102, 164; Tr. 372, 377, 381, 547), an hour and a half (App. 108; Tr. 390), or even 24 hours (App. 124; Tr. 415). Or the smoke itself would last all night (App. 108; Tr. 390), because of the closed windows (App. 34; Tr. 151) and inoperative air conditioning (App. 42, 164; Tr. 163, 547). Inmate Bernard Wilson testified that inmates had to break windows in the units to get air because of the smoke (App. 34-35, 42; Tr. 151, 163); Oliver Boling, who had no window in his cell, testified that he had to "get on my knees and stick my head in the toilet in order to breathe * * *" (App. 100; Tr. 378). Although most of the fires were set by inmates, there was testimony that they were at times set by correctional officers (App. 96, 100, 102; Tr. 371, 378, 381) and that one particular officer would set fires with trash bags and return to feed the fire (App. 102; Tr. 381-82). In any event, there was additional testimony that the correctional officers often let the fires burn (App. 41-42; Tr. 162).

Witnesses testified that they had complained frequently about the fires and smoke (App. 35, 49; Tr. 152, 180), and it is undisputed that correctional officials were aware of a problem with fires in Northeast One (App. 56-57, 209; Tr. 206-08, 749).

(b) *Evidence of threats and assaults.* There was considerable testimony about beatings administered by correctional officers in Northeast One. They occurred "more or less like an every day thing," according to inmate Bernard Wilson (App. 37; Tr. 155), who testified that correctional officers tried to beat him "half to death" sometime in August 1976 (App. 35-36, 44; Tr. 152-54, 165).⁶

(i) *Respondent Bailey.* Extensive testimony related to threats and assaults on respondent Bailey. Bailey had been brought to the District of Columbia on or about June 5, 1976, pursuant to a writ of habeas corpus ad testificandum for the purpose of testifying in the case of *United States v. Brad King*, in D.C. Superior Court (App. 21; Tr. 12). The writ indicated that Bailey was expected to give testimony on June 14, 1976 (*id.*). Although there was no evidence as to the actual date of his testimony, Bailey testified that

⁶ One of the realities of prison life is that inmates do not keep track of time (App. 46-47, 176; Tr. 170, 589). Although the inmate witnesses could not give exact dates for these incidents, most of them were able to fix late July and August as the time period during which the beatings and threats took place (App. 46, 47, 104, 105, 107, 112, 113, 185; Tr. 170, 384, 385, 389, 396-99, 630).

to the best of his recollection it took place in July (App. 142; Tr. 468). For reasons that were never explained at trial, Bailey continued to be confined at the D.C. Jail until August 26, 1976. There was extensive testimony showing that from the time of his arrival at the jail, Bailey was threatened and beaten by guards, who first sought to dissuade him from testifying in Brad King's behalf and, after he had done so, sought to punish him.

Upon his arrival at the jail, Bailey had been lodged in "Northeast Three," a tier where inmates enjoyed full privileges (App. 143; Tr. 470). Subsequently, a Captain Dickinson, accompanied by several other officers, came to Bailey's section and moved him to Northeast One, the maximum security tier, where he was placed in "dead lock" (App. 144-45; Tr. 472-73). He testified that Captain Dickinson told him, "I'm just letting you know this is an example of what you'll be getting if you testify in the Brad King case." (App. 145; Tr. 473.) He also told Bailey, "'Now, this is just to let you know what I can do.' 'You know now I'm not going to show you what I can really do until after I see what you do on the stand, if you take it.' " (*Id.*)

Bailey testified that three correctional officers—Major Long, Officer Webb, and Captain Dickinson—warned him of the consequences of his testifying in the Brad King case (App. 142, 170; Tr. 469, 566). He was told that "if I was to testify in this case * * * I would never leave the jail alive," and that he'd be left "'hanging like the guy that was left hanging in the

Brad King case,' and this guy was killed." (App. 142; Tr. 469.)

Threats were conveyed indirectly as well as directly. Oliver Boling, another inmate, testified that in late July (App. 102; Tr. 381), Captain Dickinson, Officer Webb, and Sgt. Curran had come to his cell one morning, threatened to "bust [his] God damn ass," and said:

" 'God dammit we're going to get your buddy, that nigger Bailey.' 'We're going to kill him.' And, Officer Webb went into his pocket and pulled out a little knife, looked like a Boy Scout knife and said, 'We're going to do it nice and quiet.' " (App. 94; Tr. 369.)

Two days later, Boling had a chance to describe the incident to Bailey (App. 102; Tr. 381). According to Bailey's testimony, Boling told him that the death threat had occurred, that he didn't know why they told him or the reason for the threat, and that he (Boling) didn't want to get involved (App. 159; Tr. 537).

Respondent Cooley was also aware that threats had been made against Bailey (App. 121; Tr. 411). Cooley had been told,

" 'Yeah, you tell your buddy, Mr. Bailey, that—since he likes going to court and testifying for everybody, this, that and the other, and he likes Mr. Brad King so much, you can tell him we going to kill him and see if Brad King can't pay for that.' " (App. 121-22; Tr. 411.)

Garland Hines did not know Bailey personally but was aware that guards had made a threat against Bailey and respondent Cooley because he overheard the following from Captain Dickinson or Officer Webb:

"[H]e said, 'The next time a fire is set in here . . . '—he was going to open Mr. Sonny's [Bailey's] cell and Ronald Cooley's you understand, he was going to kill him because he knows he was responsible for doing it." (App. 110; Tr. 394. See also App. 107, 108; Tr. 389, 390.)

After Bernard Wilson, another inmate, was beaten himself by correctional officers (see p. 10 *supra*), he was told:

" '[S]ince he's one of your buddies you deliver him [Bailey] this message. You tell him that we are going to kill him and he's also going to receive some of the treatment that you just received for testifying in the Brad King case this summer.' " (App. 36; Tr. 154.)

These threats culminated in a series of violent attacks on Bailey. Oliver Boling, who testified to one of the threats against Bailey (*supra*), testified that in early August (App. 101; Tr. 380), he heard an attack take place in Bailey's cell. He described the episode as follows:

" 'Well, first of all my cell is, like five cells like I said once before, down from him. One particular evening I heard this racket at the door, because I'm right at the door, and it is about six or seven

guards came into the cellblock, you know, they came in, they came right down to Bailey's cell. One pulled out a blackjack, the other reached in his pocket and pulled out a can of mace and they proceeded into the cell, then I heard a couple of moans, a couple of groans you know. Then they came out of the cell and shut the cell back and then that was it." (App. 94; Tr. 366.)

Boling testified on cross-examination that he could see Bailey because "he was hanging halfway outside the door." (App. 101; Tr. 379.) Bailey himself testified that Officer Webb "came to my cell with several other officers, and choked me up." (App. 159; Tr. 538.) Garland Hines also testified that Bailey was beaten up in his cell by guards, and he thought that the attack had taken place in the second week of August (App. 110; Tr. 393).

Bailey recounted two other instances when he was assaulted by guards. In one, an officer named R. Brown hit Bailey on the head with a flashlight and threatened to kill him (App. 147; Tr. 477). Bailey immediately complained to Lt. Johnson that Brown had threatened him (App. 149; Tr. 479). Lt. Johnson filed a report (*id.*).

The other incident occurred on one of the days Bailey was either testifying in the Brad King case or was being interviewed by King's attorney (App. 146; Tr. 475). Bailey testified that he was walking up the hall when a convict hit him in the face. When Bailey hit him back, "Officer Graves, he ran up and started

beating me with one of the slapjacks." (App. 147; Tr. 476.) After describing a "slapjack" as being a piece of leather with a steel insert (*id.*), Bailey testified:

"They put some kind of—they put it on their hand and hit you with it. So, this officer started hitting me. I hit him back. The officer, Officer Graves ran up, started beating me with his fist. He beat me down to the ground. Carl Dickson was being escorted with me. He persuaded the officers to stop them from beating me. He explained to them he'd kill me if he continued beating me in the head. I was on the ground. * * *"
(*Id.*)

Subsequently, Bailey had a hearing on the Graves incident at which Lt. Robinson was present (App. 150; Tr. 480-81). Bailey told him about Graves' assault on him. Lt. Robinson said, "'We're not going to deal with that.' 'We're going to deal about the fight you had with the other inmate.' " (*Id.*) Bailey asked them to investigate the incident, but to his knowledge they never did.

Because he could not get an investigation or any assistance from the officers, on July 9, 1976, Bailey filed a suit in the Superior Court of the District of Columbia against Graves, his superiors (App. 151; Tr. 493), and the District of Columbia (App. 18).⁷ His

⁷ Bailey's Exhibit 10 consisted of three separate documents, described at App. 150-52; Tr. 482-85. The record contains only one of these documents, reproduced at App. 18. Counsel for respondent Bailey has examined the files in both lower courts

purpose in filing the lawsuit was to "stop the administrators from threatening my life." (App. 176; Tr. 590.)

Filing the lawsuit provoked further threats by jail officials. Officer Graves approached Bailey and warned him that, if he didn't withdraw the suit, "and if I was ever placed in a secluded area, they could lead me off, that they would do something to me." (App. 155; Tr. 530.) Bailey testified further that guards came to his cell and told him he was being moved to the hospital. When he refused, a number of guards came down to his cell, took the door off, got him down and handcuffed him, and hit him several times. He was taken to Southeast Three, the ward for all mental patients. (App. 155; Tr. 530-31.)

Bailey had brought the threats against him to the attention of jail officials (App. 173; Tr. 574). Lt. Robinson, Assistant Administrator of Operations, tes-

and determined that the other two documents, including the complaint, are missing. An examination of the records of the Superior Court of the District of Columbia shows a complaint dated July 9, 1976, an application for in forma pauperis status dated September 28, 1976, and a notice from the Court to Bailey dated December 28, 1976. In addition to seeking money damages for an alleged assault by Officer Graves on or about June 23, 1976, the complaint sought "injunctive relief to stop violations under the Fifth and Sixth Amendments." The Superior Court ordered the constitutional claims dismissed for lack of jurisdiction but permitted the plaintiff to proceed on the common law torts of assault and battery. On June 28, 1977, the Superior Court ordered the complaint dismissed with prejudice.

tified that Bailey had complained both to him and to the adjustment board about threats by guards under his supervision at the jail (App. 61; Tr. 239). But he couldn't remember whether it was before or after the escape (*id.*). He conceded that it was "quite possibly correct" that Bailey had complained about threats of bodily injury by guards (App. 62; Tr. 240).

Bailey used no force to leave the jail. His testimony, uncontradicted by any government witness, was that in the early morning hours of August 26th, he found the door to his cell open (App. 165; Tr. 548). He got dressed and walked up the tier to find out what was happening, and passed an open cell with the whole window out. He climbed out the window and left by climbing down some sheets that were already hanging out the window (App. 167-68; Tr. 561-63). Bailey was in fear of his life, and when he saw the opportunity, he took it (App. 179; Tr. 594-95). He explained the reasons for his departure as follows:

"All of these threats had been placed upon me and various individuals had been telling me that the officers going to kill me, take my life for testifying in the Brad King case, and they showed me what they would do, you know, by what Officer Graves did, what Officer R. Brown did, and what Officer Webb did to me. I was in constant fear of my life, you know, and I don't want you to think that it is just because of this incident that I was in fear, you know, but like one particular time—I can show you the scars I have. I was beat before, see? I received this. And

see, this. And almost died from this. I know them people are serious about when they talk about taking your life. See, there ain't no doubt in my mind about that. I had that much fear in me." (App. 164-65; Tr. 548.)

(ii) *Respondent Cooley.* Respondent Cooley was also threatened and beaten by correctional officers during his stay at the D. C. Jail. During the time of his confinement,⁸ he was lodged in a windowless cell in Northeast One.

Oliver Boling was a witness to several of the incidents involving Cooley. He saw two or three guards back Cooley into a corner and hit him in the mouth with a "slapjack" (App. 97-98; Tr. 374.) He also saw him "roughed up quite a few times in front of my cell." (App. 98; Tr. 374.) On two other occasions, he heard guards say "they were going to kick [Cooley's] ass good." (App. 98; Tr. 375.)

Inmate Garland Hines testified that guards came into Cooley's cell on more than one occasion, threatening him and "jump[ing] on him a few times." (App. 106; Tr. 388.) Hines described another incident in more detail:

"* * * Mr. Cooley was going down the hallway and one officer was pushing him. Mr. Cooley said 'You don't have to push me. * * * I can walk.' At

⁸ At the time of the escape on August 26, 1976, Cooley had been confined at the D.C. Jail since April 10, 1976. See Gov. Exhibit 8.

the time he was handcuffed. Officer Smith said, 'Look, just shut up, keep moving.' * * * Cooley turned around trying to defend himself. He turned around and the officer pushed him. Officer Smith pulled out a big stick, a blackjack, and hit him across the face. Another officer—I don't recall his name, I know him when I see him, he sprayed some gas in his face. Mr. Cooley came on the unit and his face was bleeding * * *." (App. 106; Tr. 387-88.)

On a subsequent occasion, in the early part of August (App. 113; Tr. 398-99), Hines saw Captain Dickinson, Officer Webb and some unidentified guards go into first Cooley's cell and then "Sonny's" cell. Dickinson said, "If another fire's set tonight or any other time, I'm going to have both of your cells, and I'm going to come down and kill you." Then Webb said, "I'm coming in there, too, because I don't want you anyway." (App. 107; Tr. 389.)

Other inmates witnessed similar incidents, or observed injuries that Cooley had sustained at the hands of the guards. Respondent Bailey saw a couple of guards "jump" Cooley, throw him in his cell, and beat him (App. 166-67; Tr. 552-53). Thomas W. Robinson saw two guards with slapjacks "dragging Mr. Cooley on the escalators, * * * and I heard him hollering. * * * Mr. Cooley said, 'Stop hitting on me.' When the officer brought him around the corner he hit him up side the head." (App. 185-86; Tr. 630-31.) Finally, Bernard Wilson saw Cooley vomit "some kind of black stuff." (App. 46; Tr. 170.) Wilson also testified that

the "few times" the guards allowed Cooley to take a shower they "would be intimidating him or something like that, pushing him down to the shower, telling him to take a shower with the handcuffs and shackles." (App. 47; Tr. 171.)

Cooley also testified in his own behalf, stating that he had been beaten "quite a few times." He remembered the exact date of one incident—August 9—because he had been in court that day. Upon his return to the jail at 2:30 p.m., he was placed in a holding cell where he remained until 10:30 p.m. Before taking Cooley back to his own cell, Officer Brown ordered him to strip. He then proceeded to pick a fight with Cooley. Six other officers joined in, beating Cooley with plastic flashlights and pushing him to his cell (App. 116-17; Tr. 403-04).

Cooley complained about these beatings to a D. C. Superior Court judge; he complained to jail officials. But he noticed no response: "They act like they don't believe nothing I say. They don't believe nothing else. You ain't going to put it on paper." He also attempted to call his lawyer, but was not allowed a phone call (App. 117; Tr. 404-05).

All of these threats and beatings led Cooley to leave the jail on August 26 (App. 130; Tr. 424). Moreover, he testified that the threats of his codefendants, Bailey and Walker, precipitated his action (App. 118; Tr. 405-06).

(c) *Evidence of inadequate medical assistance.* Finally, respondent Walker introduced evidence that he had received inadequate medical treatment for his epileptic condition. Two inmate witnesses testified that they had witnessed respondent Walker having epileptic seizures while he was confined in Northeast One (App. 182-83, 185; Tr. 603-04, 625). Walker's brother testified that Walker had had many seizures while growing up (App. 187-88; Tr. 650-52). Walker examined the Chief Medical Officer of the D.C. Jail at length to demonstrate that the treatment he was receiving, or the supervision of that treatment, was inadequate (App. 133-38; Tr. 437, 454).⁹

⁹ Dr. Samuel Bullock, the Chief Medical Officer for the jail, testified that when Walker arrived at the jail he was prescribed dilantin-phenobarbital for epileptic seizures, on Walker's report of a history of such seizures (App. 133-34, 139-40; Tr. 438-39; 456-58). The dosage was ¼ gram four times a day (App. 138; Tr. 455) or three times a day (App. 140; Tr. 458). His testimony was confused on whether such medication, given on a trial basis (App. 134; Tr. 439), required a cut-off date or not. Compare App. 134; Tr. 439, 459, with App. 137; Tr. 443. His testimony about the medical records from the jail, Walker Exhibit 2-A, p. 1, also left room for question on the extent to which those records confirmed proper receipt of the medication. The exhibit, according to Dr. Bullock, showed receipt of medication on twelve dates (App. 139; Tr. 455). The exhibit gives these dates as June 15, July 4, 5, 6, 7, 9, 15, 22, August 10, 11, 13, 26—a highly irregular schedule for supplying medication required four times a day.

Other witnesses testified to inadequate medical assistance for smoke inhalation or burns (App. 35, 163; Tr. 152, 545).

(d) Justifications of the failures to return. All of the defendants testified to the reasons for their failures to return to custody. Respondent Bailey testified:

"I was in fear of my life. I know that if I turned myself in I would still be under the threats of death. Always knew that the FBI wanted to kill me, after I escaped, so I was in limbo. I didn't know what to do. I did have some people call to the officials at the jail on several occasions." (App. 175; Tr. 587.)¹⁰

Bailey testified in addition that he knew if he surrendered himself he would be returned to Northeast One and the guards would be the same guards who were there before he left (*id.*). He had heard that the FBI was looking for him but didn't feel he could tell the FBI that he did not want to return to the D.C. Jail and Northeast One because "the FBI was telling my people that they was going to shoot me." (App. 175-76; Tr. 587-88.) There was no testimony that when Bailey was arrested on November 19, 1976, at an apartment in the District of Columbia, he offered any resistance.

"While the Government apparently finds it significant that Bailey did not identify the individuals who placed calls on his behalf (Pet. Br. 6), it fails to point out that Government counsel did not ask Bailey to identify the callers. See App. 168-69; Tr. 563-64.

Respondent Cooley testified that his family had attempted unsuccessfully to get in touch with somebody in authority after his escape (App. 119; Tr. 407). He did not try to call anyone himself because he did not know whom to call, because of his problems at the jail, and because he was afraid for his life (App. 119; Tr. 408). "They probably came [*sic*] and got me, and then make me try to run and they shoot me in half when they come and get me." (*Id.*) He remained in Washington, D.C., after his escape (App. 120; Tr. 408).

Respondent Walker testified that he contacted the FBI on a number of occasions after his escape.

"As a matter of fact I kept a constant rapport with the FBI. I had people who told me that they had brought this information to my sisters that the FBI said that if they ran down on me they was going to kill me. So, in actuality I was never out of immediate threat of losing my life. If I would have given myself up I had this FBI threat to contend with and I also had to go back over to the same jail that I had just left from, and this was the reason that I consequently never turned myself into the authorities." App. 195; Tr. 710-11.

More specifically, he contended that he called the FBI on the second day after he was out, identified himself, told the agent he spoke to "that I would surrender myself if I wasn't being subjected to the same conditions and put on the same penitentiary that I had just left from." (App. 196, 198; Tr. 712, 718.) He had described "how terminal the conditions were" in

Northeast One and asked "was it any kind of way that I could get with him to make some type of arrangements as far as turning myself in, if I would have to go back to [the D.C. Jail]." (App. 197; Tr. 715-16).

Approximately ten days later, Walker testified, he had had another conversation with the agent and "indicated to him if he could work out the conditions for which I wanted to turn myself in, I would turn myself in." (App. 198; Tr. 718-19.) Those conditions were that he wouldn't be harmed and wouldn't be returned to the D.C. Jail (*id.*).

Approximately one month later, Walker further testified, he called the FBI again and offered to turn himself in under the same conditions (App. 199; Tr. 720). Walker testified that the FBI agent had agreed that he wouldn't be harmed by members of the FBI, but had not agreed that he wouldn't be returned to the D.C. Jail (App. 200; Tr. 722).

Walker was also arrested in the District of Columbia (App. 27; Tr. 66).

3. The Rulings on Duress or Necessity

From the very beginning of the trial, the Government took the position that, regardless of what evidence of duress or necessity might be presented by the defendants to justify their initial departure, they could not raise the defense because they failed to turn themselves in. (App. 20; Tr. 2. See also R. 35, the

memorandum of law filed by the Government, at pp. 7-8.)

After the government had rested, and after the defense had put on their first witness, the Government raised its "failure to return" argument again, asking that the defendants be required to make a proffer as to how they intended to satisfy the return requirement (App.52; Tr.188). The court, though indicating that it agreed with the return requirement, deferred the matter (App. 54; Tr. 191).

At the end of the fourth day of trial, the court requested counsel to submit proposed instructions (Tr. 658-59). The critical language of the respondents' proposed instruction on duress¹¹ is set forth in the margin.

¹¹ "Coercion which would excuse the commission of a criminal act must result from:

"1) Threatening [*sic*] conduct sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;

"2) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;

"3) The fear or duress was operating upon the mind of the defendant at the time of the alleged act; and

"4) The defendant committed the act to avoid the threatened [*sic*] harm." (App. 17; R. 32A.)

No other proposed instructions appear in the record.

At the beginning of the fifth and last day of trial the Court said:

"Now the problem the Court has with the defense of duress and coercion in this case is that there is no showing by you or by any other defendant that you turned yourselves in after you made your escape. That is an essential ingredient. For that reason, I don't think I'm going to instruct upon duress or coercion." (App. 189; Tr. 667.)

Later in the day, the Court referred back to the statement just quoted and said:

"Well, the Court reached that conclusion after having written a fairly extensive instruction on the subject of duress and coercion and having studied the cases over the weekend. The Court concluded that in order to avail one's self of the defense, one must notify the authorities of his whereabouts or turn himself in, that one is not exonerated by affecting an escape regardless of the conditions, unless one takes that action. That is the ruling of the Court. * * *" (App. 201; Tr. 725.)

The last discussion about duress occurred after the close of all of the evidence (App. 213-21; Tr. 769-81).¹²

¹² The court also indicated at this time, in response to a question from counsel seeking to argue lack of specific intent, that it would instruct that escape was a crime of general intent (App. 216; Tr. 773-74).

At the conclusion of the discussion, the Court reiterated:

"Had these men notified the authorities or the public defender in an effort to surrender under conditions that might have been arranged by the public defender, then I would have permitted the duress and condition argument. In fact, I have here an instruction, which I drew up very carefully with that in mind, but I realized that at the end of which I was calling upon the jury to make a finding that they couldn't make, that is to say that these men had turned themselves in and that is a prerequisite to the assertion of the defense of duress, or coercion. So for that reason I decided that I had to assume the responsibility for myself." App. 219-20; Tr. 778-79.

At no time in the course of any discussions about duress had the Government asked the court to rule that defendants had not introduced sufficient evidence of threats of "immediate" harm to entitle their defense of duress or coercion to go to the jury.

4. Instructions to the Jury

After some general instructions on the meaning of intent (App. 221-22; Tr. 799-800), the court instructed the jury that the offense charged was an escape on August 26, 1976.¹³ The court concluded this part of

¹³ "These essential elements are as follows: First, *that at the time of the offense in the indictment, that is to say August 26th, 1976, the defendant in question * * * had been convicted of a felony.*

the instructions by saying that the intent required by § 751(a)

"is the general intent, and it means only that a defendant has the purpose to do something, the will to do the act. It means the act was done consciously and not inadvertently or accidentally." (App. 224; Tr. 803.)

Finally, the court instructed the jury that it could not consider respondents' evidence of duress because they had failed to show that, after escaping, they had turned themselves in.¹⁴

*"And at the time the offense took place he was serving time for this conviction. ****

*"The second essential element *** is that as a result of the conviction the defendant was committed to the custody of the Attorney General or designated representative, and was in custody at the time of the offense.*

*"The third essential element *** is that the defendant escaped from such custody. The question is simply, whether the defendant without authorization did absent himself from his place of confinement." (App. 222-23; Tr. 801-02. Emphasis added.)*

¹⁴ "You are instructed as a matter of law that conditions at the District of Columbia Jail or the new detention center, no matter how burdensome or restrictive an individual inmate may find them to be, are not a defense to the charges in this case, nor justification for the commission of the offense of escape.

"If a particular inmate or group of inmates feel that they have been treated unfairly, they may seek correction of

C. Respondent Cogdell

Respondent Cogdell was tried two months later before the same trial judge. The Government's evidence, besides going to custody within the meaning of the statute and showing that, like the other respondents, Cogdell had escaped from the New Detention Center in the morning of August 26, 1976, showed that Mr. Cogdell had been apprehended on September 28, 1976 (I Cogdell Tr. 26, 56). Mr. Cogdell proffered at trial evidence of duress or coercion both as a defense to the charge of escape and as a reason for his failure to turn himself in. Counsel expressly asked the trial judge to take into account "all of the testimony" heard in the earlier case. The trial judge agreed that he had, and

those conditions in the court system, but they are not entitled to commit the offense of escape or seek to take the law into their hands.

"Now, the Court permitted the defendants to introduce this evidence and to seek to show that following their escape they turned themselves in, for if one, after escaping turned himself in, then the defense of coercion or duress may be brought to the attention of the jury as a defense, but only if a defendant turns himself in.

"Now, there are recognized procedures for this to be done, and requisite protections insured by such action. As the Court heard the evidence, that was not done in this case. So the Court felt that it was incumbent upon the Court to assume responsibility for this aspect of the case, and to take it out of the case in effect. So you are not to consider the defense of duress or coercion for the reasons stated. The defendants did not turn themselves in." (App. 224-25; Tr. 806-07.)

stated that he was excluding all testimony about duress or coercion, because respondent did not turn himself in to state or federal authorities. (See App. 228-30; I Cogdell Tr. 11-15.)¹⁵

The judge's instructions to the jury were essentially similar to those given at the trial of respondents Bailey *et al.* (App. 231-33; II Cogdell Tr. 110-13). Instructions relating to duress or coercion were omitted since no such evidence had been allowed in.

D. The Decision of the Court of Appeals

The court of appeals reversed respondents' convictions and remanded for new trials on the failure of the trial judge to instruct the jury correctly on intent and on the relevant defense (Pet. App. 1a-27a, 101a-102a).¹⁶

¹⁵ The Government contends that Cogdell admitted that he had not attempted to contact the authorities after the escape (Pet. Br. 9, 42). This is incorrect. Cogdell never testified at trial (Tr. May 9, 1977, at 62). As noted, he offered to prove that his apprehension of bodily harm continued unabated even *during* the period of escape.

¹⁶ Each of the respondents raised issues relating to the proof of or instruction on "custody" within the meaning of § 751(a), and each lost on these issues (Pet. App. 27a-34a, 104a-113a). Since the arguments of respondents Bailey, Walker, and Cogdell would have required dismissals of the indictments, those respondents presented their custody arguments on conditional

(a) *Intent.* The court found, in agreement with *United States v. Nix*, 501 F.2d 516 (7th Cir. 1974), that "a great deal of unnecessary confusion has been generated by the use of ill-defined terms and concepts such as 'specific' and 'general' intent." Pet. App. 6a. In further agreement with *Nix*, the court concluded "that an 'escape' occurs when a defendant (1) leaves custody (2) voluntarily, (3) without permission, and (4) with an intent to avoid confinement." Pet. App. 8a.¹⁷

cross-petitions for writ of certiorari (Nos. 78-5904, 78-5889, and 78-5887, respectively). Those petitions were denied on March 19, 1979.

Respondents Bailey, Cooley, and Walker presented additional arguments as well, which were not ruled upon by the court of appeals. Pet. App. 35a nn.67-68. Accordingly, if the judgment of the court of appeals is reversed, these cases must be remanded to the court of appeals for further proceedings.

¹⁷ The intent element was elaborated in a footnote, where the court said, *inter alia*:

"[I]f a prisoner offers evidence to show that he left confinement *only* to avoid conditions that are not normal aspects of 'confinement'—such as beating in reprisal for testimony in a trial, failure to provide *essential* medical care, or homosexual attacks—the intent element of the crime of escape may not be satisfied. When a defendant introduces evidence that he was subject to such 'non-confinement' conditions, the crucial factual determination on the intent issue is thus whether the defendant left custody *only* to avoid these conditions or whether, in addition, the defendant *also* intended to avoid confinement. * * *

Pet. App. 9a n.17 (emphasis in original).

The court stated that in the ordinary case the prosecution can establish a *prima facie* case that a defendant "escaped" merely by offering evidence that the defendant departed from custody without permission. The defense, however, has the opportunity to introduce evidence of jail conditions, threats, and violence in an effort to raise a reasonable doubt about whether defendants acted "voluntarily" or intended to "avoid confinement." Pet. App. 9a-10a. This evidence can be rebutted by the Government. Pet. App. 11a. In such a case, when instructing the jury,

"the judge should direct the jurors' attention to those considerations that require special emphasis. In addition to specifying the major indicia of voluntariness and intent—the immediacy, specificity, and severity of any alleged threats or fears, the availability of viable alternatives to unauthorized departure, and the defendant's decision whether and when to return to custody—the court should remind the jury of the inevitable difficulties associated with prison discipline and of the possible biases of defense and prosecution witnesses testifying with respect to that aspect of the case." Pet. App. 11a-12a.

The court emphasized that it is the jury "that must make the final determination whether the prosecution has met its burden of proving each of the elements of the crime beyond a reasonable doubt." *Id.*

Since the trial court had not instructed the jury in the terms specified by the court of appeals, the convictions had to be reversed.

(b) *The choice-of-evils defense.* Turning to the trial court's refusal to let the jury consider the defense of "duress," the court of appeals noted that "[t]here is some theoretical confusion over the nature of the defenses of duress and necessity, especially in the context of prison escape cases." Pet. App. 16a. It described one of the two general principles involved as "duress as compulsion," in the sense that a "person will not be held responsible for an offense he commits under threats or conditions that a person of ordinary firmness would have been unable to resist." Pet. App. 17a. The court stated that this principle "like the defenses of intoxication, insanity, and mistake, negates the intent or voluntariness elements of an offense." *Id.* The defense based on this principal was discussed no further, since it had been addressed in the earlier part of the opinion on "intent."

The court described the other general principle reflected in duress/necessity cases as one of "justification by choice of the lesser evil—i.e., that a person is not guilty of an offense if he committed it because he reasonably believed his action was necessary to avoid a harm more serious than that sought to be prevented by the statute defining the defense." Pet. App. 19a. With regard to this defense,¹⁸ the court stated that this particular case

'in its present posture at most presents the relatively narrow question whether a jury should be

¹⁸ Although respondents' proposed instruction (App. 17; R. 32A) had been phrased in terms of coercion or duress, as had

allowed to consider an otherwise sufficiently supported choice of evils defense in the absence of one of the special prerequisites some courts have imposed upon such defenses in escape cases—the requirement that an escapee turn himself in to the authorities immediately after escaping.” Pet. App. 21a-22a. (Citing *People v. Lovercamp*, 43 Cal. App. 3d 832, 118 Cal. Rptr. 110 (1974).)

Although this requirement had been endorsed in *United States v. Michelson*, 559 F.2d 567 (9th Cir. 1977), the court found that the Ninth Circuit’s analysis had been based “on the critical assumption that escape is a ‘continuing’ offense, i.e., that one may commit the crime of escape, even if his original departure from custody was justified, by failing or refusing to return to custody once the justifying circumstance is no longer present.” Pet. App. 23a. Whatever the validity of that assumption, the court found it inappropriate in this case. The court said:

“Even if we accept the notion on which the requirement is based—that escape is a continuing offense—this theory was not reflected in the indictment or the trial court’s charge to the jury.

most of the discussions before the trial court, the court of appeals found the proposed instruction broad enough to raise a choice-of-evils defense, given the theoretical confusion over labels found in most cases. Pet. App. 18a-19a n.32. The Government has not challenged this conclusion.

* * * [T]his is not a case where the jury was considering whether a defendant had escaped by failing to return.” Pet. App. 24a-25a.¹⁹

Accordingly, the trial court erred in denying a choice of evils instruction “on the ground that the defendants had not returned or adequately explained their continued absence.” Pet. App. 25a. The court concluded:

“In effect, the trial court denied appellants’ right to have the jury consider a duress defense to the crime with which they had been charged (escaping on August 26) because the court found that they would in any event be guilty of an offense under a theory (failure to return) that was never presented either to appellants or to the jury. We

¹⁹ This passage is the only mention in the text of whether escape might be a “continuing offense.” In the intent section of its opinion, the court of appeals had noted that respondents had argued that in order to violate § 751(a) a defendant must have the requisite intent at the time he leaves custody. The court rejected that argument, saying that it agreed with other decisions there cited “that the trial court should instruct the jury that a prisoner who lacks the intent to avoid confinement at the time he leaves custody may nevertheless commit the crime of escape if he later forms this intent and therefore fails to report to the authorities or to turn himself in.” Pet. App. 9a-10a n.17. See also Pet. App. 26a n.52. In the text, however, the court only assumed that escape was a continuing offense (Pet. App. 24a-25a), and in another footnote it recognized “some force” in the argument that it is not such an offense (Pet. App. 25a n.48).

cannot sanction such an obvious violation of appellants' constitutional right to jury trial." Pet. App. 25a-26a (emphasis in original).

In view of this ruling, the court stated that "[u]nder the circumstances of this case it is unnecessary for us to consider exhaustively the proper prerequisites to a choice of evils defense in escape cases." Pet. App. 26a.

(c) *The immediacy requirement.* According to the Government, the court of appeals "dismissed the traditional duress requirement of imminent or 'immediate harm' in the escape cases." (Pet. Br. 12.) The Government is in error. Not only did the court expressly state that "the immediacy, specificity, and severity of any alleged threats or fears" was a relevant consideration for the jury (Pet. App. 11a-12a), but it appears that the court of appeals found adequate evidence of danger of "immediate harm." In its brief as appellee in the court of appeals, the Government did not list an issue on appeal that respondents had not presented sufficient evidence of threats of immediate harm. The relevant argument section of its brief was focused entirely on defending the trial court's ruling on its own terms—that the return requirement was appropriate to any duress or coercion defense in escape cases and that respondents had failed to meet it. It was only in a footnote at the end of this argument that the Government mentioned an

"immediacy requirement."²⁰ Accordingly, the court of appeals was presented with no detailed argument at all about the meaning of the "immediacy requirement" or its application to this case.

Under these circumstances, the court of appeals manifestly treated the Government as having conceded, for all practical purposes, the adequacy of the duress evidence presented by respondents, apart from the issue of return of custody. The court noted specifically that the trial court would have given an instruction on duress but for the failure to return, and continued: "Since the court's instruction would have been given but for the return requirement, the choice of evils issue in this case turns on the validity of that requirement." Pet. App. 22a-23a n.43. In another footnote, the court observed that the dissent argued that respondents failed to present sufficient evidence

²⁰ The footnote reads: "Evidence as to the other requirements discussed in *Lovercamp* was also sadly lacking. The conditions described by numerous witnesses called by the defense could hardly be found to establish the seriousness, immediacy, and imminence of the alleged danger to appellants' well-being. The record is devoid of any reference to an assault or even the utterance of a threat within two weeks before the escape." Brief for Appellee, D.C. Cir. No. 77-1404 *et al.*, at 28 n.29. No mention appears of the evidence of danger of smoke inhalation from fires set "every day."

of harm to be avoided to get to the jury. The court replied:

"The dissent's view on this point contradicts the opinion of the trial court, which was willing to submit a 'duress' instruction except for appellants' failure to meet the return requirement. * * * In our view the trial court's conclusion that the evidence on this point was sufficient to submit to the jury was clearly correct." Pet. App. 21a n.39.

The court then added:

"The dissent's narrow insistence on threats of 'immediate' harm as an absolute prerequisite for the choice of evils defense seems particularly inappropriate in escape cases, where a possibility for escape (especially nonviolent escape) is not likely to remain available until a substantial threat becomes 'immediate' in the narrow sense urged by the dissent." *Id.*

INTRODUCTION AND SUMMARY OF ARGUMENT

The question raised by this appeal is not whether the respondents should be acquitted of the crime of escape, but rather whether a new trial should be ordered so that they may have the opportunity, hitherto denied them, of having the jury decide whether their escapes were to avoid conditions that put them in

danger of serious bodily injury or death and were therefore not culpable.²¹

"An accused is entitled to a jury determination of his guilt or innocence, and it is his constitutional right to present any and all competent matters in his defense. A right to a trial by jury and the right to adduce evidence in his behalf are two of the fundamentals inherent in the due process guarantee of a fair trial. *In re Oliver*, 333 U.S. 257, 273 (1948). Thus, where an accused asserts a defense sanctioned by law to justify or to excuse the criminal conduct charged, and there is some credible evidence to support it, the issue is one of fact that must be submitted to the jury." *State v. Horn*, 58 Haw. 252, 566 P.2d 1378, 1380 (1977).

This Court has recently overturned judgments of conviction where instructions were deemed to invade the fact-finding function "which in a criminal case the law assigns solely to the jury." *Sandstrom v. Montana*, 61 L. Ed. 2d 39 (June 18, 1979); *United States v. United States Gypsum Co.*, 438 U.S. 422, 446 (1978).

²¹ A prosecution for escape only occurs after the prisoner has turned himself in or has been recaptured. Unlike most prosecutions, if the defendant is acquitted he will not be set free because invariably he will have to finish serving his original sentence. So the only issue is whether the facts and circumstances demonstrate a need for additional punishment to be imposed due to his unauthorized departure. That, of course, is the situation in the cases before this Court.

In this case, not only did the trial court refuse to permit the jury to consider substantial evidence of fires, threats and beatings as a basis for a choice-of-evils defense, but also instructed the jury that evidence of life-threatening assaults and other conditions was irrelevant to the issue of the respondents' intent in escaping. These actions violated the respondents' right to jury trial.

I

A. The Government concedes that some form of duress defense is available in the context of a prison escape. But it asks the Court to place special restrictions on its availability and make them essential preconditions to raising the defense. Two of these are that the defendant must turn himself in to the authorities as soon as he reaches a position of safety, and that the threat to his life or personal safety must immediately precede the escape. This position is based on a fundamental misreading of *People v. Lovercamp*, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (1974), which stressed that the conditions prerequisite to raising the defense are questions of fact to be decided by the trier of fact after taking into consideration all the surrounding circumstances. Even if the case can be read to support the Government's interpretation, it is of course not binding on this Court, which must decide the appropriate principles to be applied by the federal courts.

The stringent rule urged by the Government has been rejected in well-considered decisions by the supreme courts of Michigan, Illinois, and New Mexico, on the ground that it would impinge on the fact-finding function of the jury. The defendant's culpability must be determined by the jury in light of all the circumstances, and failure to return is but one factor, albeit an important one, that goes to the weight of the evidence. The unstated premise of the Government's argument is that juries cannot be trusted to evaluate all the evidence, including failure to return, and arrive at an appropriate verdict of guilt or innocence based on the weight of the evidence and the credibility of the witnesses. The Government's position is neither necessary to serve legitimate societal interests nor compatible with the constitutional requirement of trial by jury.

B. The offense for which the respondents were indicted and convicted was the initial departure from custody on August 26, 1976, and for events which took place thereafter. The duress defense went to this event. Neither the indictment nor the court's instructions to the jury were based on a theory of continued absence. The jury could only have convicted the respondents for leaving custody and not for remaining absent. The failure of the judge to permit the respondents to defend against the crime with which they were charged invaded the jury's fact-finding function and requires a reversal of the conviction. While failure to

return might be some evidence for the jury to consider as to the existence of duress or choice of evils, it violated due process to bar the defense, particularly where the respondents were not charged with continued absence and the jury not so instructed.

Furthermore, due process requires that on appeal the validity of the respondents' convictions be appraised on the same basis as the case was tried and as the issues were determined in the trial court. *United States v. Cruikshank*, 92 U.S. 542, 558 (1876); *Russell v. United States*, 369 U.S. 749, 766 (1962). Where respondents were convicted of the initial departure, their convictions cannot be upheld on the different theory that they violated § 751(a) by their failure to return.

C. By imposing on respondents a requirement that they turn themselves in to proper authorities before they could claim a defense of duress or necessity to the charge of escape from prison, the district court effectively penalized them for conduct that took place after their departure from custody was complete. But 18 U.S.C. § 751(a) does not make failure to return a crime.

Prior to 1930, when the federal escape statute was enacted, it was well established that the offense of escape only prohibited the actual departure from lawful confinement. Both state and federal precedents from that era support the view that escape was not a continuing offense. In the absence of evidence to the

contrary, it must be presumed that Congress intended to incorporate that learning in the new statute.

Nor is escape a continuing offense under accepted canons of statutory construction. Criminal statutes must be strictly construed against the Government. The continuing offense doctrine is applied only in limited circumstances. *Toussie v. United States*, 397 U.S. 112, 115 (1970). The courts have found continuing offenses only where the evidence of congressional intent is so strong as to make the conclusion almost axiomatic. Section 751(a), and its legislative history, is barren of any language that would suggest that the offense includes anything more than the act of departing. To hold otherwise would violate the established principle that questions regarding the scope of a criminal statute must be resolved in favor of lenity to the accused. *Dunn v. United States*, 60 L. Ed. 2d 743, 754 (June 4, 1979).

D. The Government claims that the evidence was insufficient as a matter of law to demonstrate that the threatened harm was imminent. The trial judge did not refuse to give the duress instruction on this ground; the instruction was not given solely because the respondents had failed to return to custody. The Government did not brief the immediacy issue in the court of appeals or in its petition for rehearing and suggestion for rehearing *en banc*. It was mentioned only tangentially by the court of appeals. This Court's

appellate jurisdiction is to review findings by the lower courts and not to decide evidentiary questions in the first instance.

In any event, what constitutes present, immediate and impending compulsion depends upon the circumstances of each case. The trend is to relax traditional notions of immediacy. This is particularly appropriate in the prison context where a prisoner may be exposed to long lasting, unrelenting pressure of threatened harm. There is sufficient evidence in the record concerning threats, beatings, lack of essential medical treatment and other life threatening conditions to create a question of fact for the jury.

II

The federal escape statute is silent as to the nature of the intent that must be shown to sustain a conviction. This is evident from the inclusion of both escape and attempted escape because the latter traditionally requires a showing of "specific" intent. The legislative history is similarly unenlightening. Nor does reference to early common law provide a reliable guide to Congress' intention considering the fact that conditions at common law were very different. This Court should adopt a standard of intent in light of the principles of the common law as they may be interpreted in light of reason and experience.

The Model Penal Code has rejected the traditional strict distinction between specific and general intent,

and the better reasoned opinions have eschewed labels in an effort to analyze and define the mental element of escape. See, e.g., *United States v. Nix*, 501 F.2d 516 (7th Cir. 1974); *Bavero v. State*, 347 So. 2d 781 (Fla. Dist. Ct. App. 1977); *Lewis v. State*, 318 So. 2d 529 (Fla. Dist. Ct. App. 1975), *cert. denied*, 334 So. 2d 608 (Fla. 1976). The essential mental element of escape is the intent to avoid confinement, and where a prisoner leaves solely to avoid life-threatening conditions of confinement, defined to include beatings, lack of *essential* medical treatment, and homosexual attack, the essential mental element is missing. In considering whether the mental element is present, the jury should be able to consider all the facts and circumstances from which the defendant's intent can be inferred, including the imminence of the harm, available alternatives, and failure or tardiness in returning.

Contrary to the Government's supposition, there is no evidence that this rule will lead to an increase in the incidence of prison escapes. Evaluation of the defendant's mental state is one of the traditional roles performed by the jury, and there is no reason to believe that the jury will not be able to carry out that function in the escape context and recognize cynical manipulation of the defense. The failure of the escaped prisoner to return or contact the authorities remains an extremely pertinent factor in evaluating his intent but is not, as a matter of law, dispositive of the issue.

ARGUMENT

I

The Trial Court Erred in Refusing to Instruct the Jury on the Defense of Duress or Choice of Evils

A. Failure to return to custody should not act as an absolute bar to a defense of duress or choice of evils in a federal prosecution for escape

1. Duress in the non-escape context

From ancient times the law has recognized that there are certain situations where behavior which would ordinarily violate the penal laws should not be punished. In one form or another, the defense of duress has been known to English law since the fourteenth century. *Lynch v. Director of Public Prosecutions*, [1975] 1 A.C. 653, 681, [1975] 1 All E.R. 913, 927 (H.L.).²²

²² The defenses were generally classified as duress, coercion, and necessity, although these distinctions were not always pure. Even though the underlying principles and limits of these doctrines have often been interwoven, and labels cannot be permitted to obscure basic principles, the court of appeals found that it aids analysis to distinguish between two independent strains which run through these defenses. The first basic principle—which the court of appeals refers to as “choice of evils”—recognizes that an individual may be placed in a predicament where whatever he does will harm himself or someone else. This defense justifies an act on the basis of a societal judgment as to which

While acknowledging the development of the defense, the government argues that the courts imposed limits on the defense from the outset because it “held within it the germs of potential disorder.” Thus, “if believed by the jury—and proof of duress often consisted of little more than the accused’s self-serving assertions—the defense operated to free defendants who had admittedly committed all the elements of a criminal offense.” The Government states, quoting a law review article,²³ that “the business of excusing

conduct constitutes the greater injury. The second basic principle recognizes that an individual may be required to perform an act under threats or conditions that a person of ordinary firmness would be unable to resist. The former classification *justifies* an ordinarily wrongful act because under the circumstances it is in fact the “right thing to do,” even though the actor intends to break the letter of the law. The latter category *excuses* the actor from criminal responsibility because the circumstances negate the intent or volitional element of the offense. The court of appeals gave separate consideration to these historical doctrines. The government, in its brief, refers generally to duress and does not differentiate between the “choice of evils” and “constraint upon the will” theories. Pet. Br. 22 n.13, 26 *et seq.* The argument in this part of respondents’ brief is fully applicable to either theory of “duress.”

²³ Newman & Weitzer, *Duress, Free Will and the Criminal Law*, 30 S. Cal. L. Rev. 313 (1957). This article strongly advocates entrusting all the issues raised by the duress defense to the jury. *Id.* 330-31. Particular attention should be given to the author’s suggested revisions of the principles governing the defense which, in their view, were necessary “if there is to be a rational meaning to the rule that an act done from compulsion is not a crime.” *Id.* 334.

individuals from crimes which, in the last analysis they had committed bodily, was a difficult and dangerous affair. Who could see or wisely guess at the presence of a will which freely motivated the body in that dreadful moment of criminal action?" (Pet. Br. 23-24.)

Surely, these are unremarkable observations with which we have no quarrel. But the same observations can be made of any defense to a criminal charge which justifies or excuses the commission of an act otherwise considered unlawful. Self-defense to a charge of murder, with its traditional element that one attacked must first retreat before using deadly force, provides an apt example. In 1921 this Court had to decide whether the standard for retreat was the common law objective standard of whether a man of reasonable prudence would have retreated or a subjective standard that the defendant himself had reasonable grounds of apprehension. In *Brown v. United States*, 256 U.S. 335 (1921), the Court, per Holmes, J., held that the ancient common law formulation was inadequate for the protection of the accused's rights. Justice Holmes observed that conditions had changed from the time at common law, when any man who killed another had to seek a pardon, and that rules developed under conditions very different from the present "have had a tendency to ossify into specific

rules without much regard for reason." 256 U.S. at 343. Instead of rigid rules, the court held:

"Rationally the failure to retreat is a circumstance to be considered with all the others in order to determine whether the defendant went further than he was justified in doing; not a categorical proof of guilt. The law has grown, and even if historical mistakes have contributed to its growth it has tended in the direction of rules consistent with human nature. * * * Detached reflection cannot be demanded in the presence of an uplifted knife." 256 U.S. at 343.

Thus the same concern which the government raises in this case—abuse of the defense by the unscrupulous—was resolved in favor of a flexible approach with the jury being the ultimate arbiter of the facts. See Newman & Weitzer, *Duress, Free Will and the Criminal Law*, 30 S. Cal. L. Rev. 313, 333-34 (1957).²⁴

The Government points to three main limitations at common law which were designed to curb abuses (Pet. Br. 24). The first "limitation" is that the accused must have been threatened with immediate death or serious bodily harm. This is the traditional definition

²⁴ Even the Government appears to accept the notion that common law restrictions on defenses such as duress should be relaxed, for they cite, with apparent approval, the amended version of S. 1 that "an affirmative defence of * * * duress * * * shall be determined by the courts of the United States according to the principles of the common law as they may be interpreted in the light of reason and experience." (Pet. Br. 26 n.17, emphasis added.)

of what the defense requires but it is also true, both here and in England, that a threat of *future* injury may be sufficient depending upon the circumstances. American Law Institute, Model Penal Code § 2.09, Comment, p. 8 (Tent. Draft No. 10, 1960); *R. v. Hudson & Taylor*, [1971] 2 Q.B. 202, 207, [1971] 2 All E.R. 244, 247. As long as some evidence is introduced, the question is for the jury.

The second limitation is that the defense has not traditionally been recognized in cases of murder. But changing times have altered even this venerable rule, and it is now the law in England that the defense is available against a charge of second degree murder. *Lynch v. Director of Public Prosecutions*, *supra*.²⁵ Of course, this limitation has no applicability to this case.

²⁵ The Model Penal Code would make the duress defense applicable in murder cases. "We think it obvious that even homicide may sometimes be the product of coercion that is truly irresistible, that danger to a loved one may have greater impact on a man of reasonable firmness than a danger to himself, and finally, that long and wasting pressure may break down resistance more effectively than a threat of immediate destruction." Model Penal Code, Sec. 2.09, Comment p. 8 (Tent. Draft No. 10, 1960).

A number of American jurisdictions provide for duress and choice-of-evils defenses by statute without excluding murder. See, e.g., N.Y. Penal Law § 40.00 (1975); 18 Pa. Cons. Stat. Ann. § 309 (1972); Conn. Gen. Stat. § 53a-14 (1977); Hawaii Rev. Stat. §§ 703-231, 703-302 (1976); N.H. Rev. Stat. Ann. § 627:3 (1974).

The third limitation, also identified by Judge Wilkey in his dissent, Pet. App. 49a, is that the defendants have no reasonable opportunity to avoid the threatened harm. This goes to the availability of other options, short of committing a crime, to extricate oneself from danger. In most cases, this raises a question of fact for the jury. But to this the Government has engrafted a fourth "limitation" that, it claims, provides theoretical support for a "return requirement" in escape cases. This limitation is that the threat must have lasted for the duration of the otherwise criminal conduct. For this proposition the Government cites *Respublica v. M'Carty*, 2 U.S. (2 Dall.) 86 (Pa. 1781),²⁶ a treason case that demonstrates the important function played by the jury even where the duress defense is carefully circumscribed. The Government mistakenly claims that in *M'Carty* the Court rejected a claim of duress, noting that the defendant had remained with British troops for a period sufficiently lengthy that he might "easily have accomplished his escape," and that his intention could not "remain unexecuted for so long a period." It fails to point out that the quoted language appeared in the jury instruction. The case was submitted to the jury and *M'Carty* was acquitted.²⁷ See also *R. v. Hudson & Taylor*, *supra*, [1971] 2 Q.B. at 207.

²⁶ Contrary to what might be inferred from the Government's citation form, *Respublica v. M'Carty* is a decision of the Supreme Court of Pennsylvania, not the federal Supreme Court.

²⁷ The rule that the Government professes to be a general limitation on the duress defense was developed and has traditionally

Whether or not these limitations were once viewed as "essential conditions" to cabin the defense and ensure that it was only available in truly coercive or "choice-of-evils" situations is beside the point. The unvarying trend, as exemplified by the Model Penal Code,²⁸ has been to relax the conditions for raising the defense and to enhance the role of the jury.

2. Duress in the escape context

Even if the "traditional limitations" on the duress or choice-of-evils defense were in full force and effect, the Government would not be content to have them applied in the prison escape context. It proposes a rule, based on its understanding of *People v. Lovercamp*, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (1974),

been applied in treason cases. *D'Aquino v. United States*, 192 F.2d 338, 358 n. 11 (9th Cir. 1951), *cert. denied*, 343 U.S. 935 (1952). Thus it is designed for precisely the opposite situation from the present one, *i.e.*, the defense is made unavailable to one who fails to escape. Some lower federal courts have applied a criteria of "escapability" as a prerequisite to raising the duress defense in certain contexts, not relevant here. *R.I. Recreation Center, Inc. v. Aetna Casualty & Surety Co.*, 177 F.2d 603 (1st Cir. 1949); *Shannon v. United States*, 76 F.2d 490, 493 (10th Cir. 1935). If *R.I. Recreation* states the law, then it should not be the law, as its shocking facts attest. Compare *Lynch v. D.P.P.*, *supra*. In any event, this limitation on the duress defense applies to a captor situation, and is inapposite here.

²⁸ See American Law Institute, Model Penal Code §§ 2.09 (Duress), 3.02 (Justification Generally: Choice-of-Evils) (Proposed Official Draft 1962).

that would impose even more rigid limits on the availability of the defense—constraints that are unique, that have no counterpart in defenses to much more serious crimes, and that would deprive the respondents in this case of having the jury consider their defense.

The ancient common law recognized the choice of evils defense to prison breach.²⁹ The Government concedes that the defense is available in spite of the historical reluctance of the courts to apply it in escape cases. Nevertheless, it expresses concern that the defense is particularly subject to abuse in the escape context and urges the Court to adopt the "conditions" set out in *People v. Lovercamp*, *supra*, including the dictum that "the prisoner immediately reports to the proper authorities when he has attained a position of safety from the immediate threat," as essential preconditions to raising the defense. The result of the mechanical application of this formulation is to deprive the defendant of jury consideration of his defense if one of the essential elements is missing. This position cannot be squared with *Lovercamp* itself or

²⁹ "In some cases it is lawful for the prisoner to break prison both at the common law, and notwithstanding this statute: as if the prison be set on fire, either by lightning or otherwise, unless it be by the privity of the prisoner, he may break prison for safeguard of his life. * * * But it must be inevitabilis necessitas." E. Coke, Second Institutes *590. See 1 M. Hale, Pleas of the Crown *611; 2 Bishop's New Criminal Law 628 (8th ed. 1892); *Baender v. Barnett*, 255 U.S. 224, 226 (1921).

the several influential cases which have applied it. The "return requirement" is the heart of the Government's case, but no persuasive reason is set forth to justify its substantial intrusion on the jury's function.

3. *An absolute return requirement interferes with the fact-finding function of the jury and is unnecessary to protect legitimate societal interests.*

In *People v. Lovercamp*, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (1974), the court held that a choice-of-evils defense was available to a defendant in an escape case. In doing so, the court sought to implement its belief that "[i]n a humane society some attention must be given to the individual dilemma." *Id.* 112. To accomplish this goal without endangering the legitimate interests of society, the court characterized the necessary inquiry as "looking to all the choices available to the defendant and then determining whether the act of escape was the only viable and reasonable choice available." *Id.* To facilitate implementation of the principle that the "defense of necessity to an escape charge is a viable defense" (*id.* 115), and "to insure that the rights and interests of society will not be impinged upon" (*id.* 112), the court announced five conditions that would govern the availability of the defense.³⁰ The court also made perfectly clear that

³⁰ The five conditions are:

"(1) The prisoner is faced with a specific threat of death, forcible sexual attack or substantial bodily injury in the immediate future;

"[w]hether any of the conditions requisite to this defense exist is a question of fact to be decided by the trier of fact after taking into consideration all the surrounding circumstances." *Id.* 116. In *Lovercamp* the defendants had been recaptured so soon after their escape that the court modified the fifth element to whether they *intended* to report to the authorities and held that "[w]hether that testimony is believable under the facts and circumstances of this case will be a question of fact addressed to the jury." *Id.* 116.

In view of the court's stated intention that the viability of the defense in any given case be a question of fact for the jury, it is ironic that *Lovercamp* is the theoretical base for the government's case. We believe it has fundamentally misread *Lovercamp*.³¹ Subsequent cases have decisively rejected the interpretation of *Lovercamp* that the Government has advanced

"(2) There is no time for a complaint to the authorities or there exists a history of futile complaints which make any result from such complaints illusory;

"(3) There is no time or opportunity to resort to the courts;

"(4) There is no evidence of force or violence used towards prison personnel or other 'innocent' persons in the escape; and

"(5) The prisoner immediately reports to the proper authorities when he has attained a position of safety from the immediate threat." 43 Cal. App. 3d at 823, 118 Cal. Rptr. at 115.

³¹ Contrary to the Government's representation, *Lovercamp* was not "the first appellate decision to analyze the competing

as an unwarranted interference with the fact-finding function of the jury.

In *People v. Luther*, 394 Mich. 619, 232 N.W.2d 184 (1975), the Supreme Court of Michigan held that the defense of duress was a question for the jury. The defendant had been confronted in the lavatory by six unknown assailants who made homosexual demands of him. When he refused and attempted to leave the bathroom, he was beaten with a toilet bowl brush, had a knife waved in his face, was knocked down or fell and hit his face on a wash basin and was literally

considerations and to find the defense available to an escape defendant" (Pet. Br. at 29). *Lovercamp* was the first appellate decision to apply the *necessity* theory but the Michigan Court of Appeals had already upheld the availability of the *duress* defense when *Lovercamp* was decided. *People v. Harmon*, 53 Mich. App. 482, 220 N.W.2d 212 (1974); *People v. Luther*, 53 Mich. App. 648, 219 N.W.2d 812 (1974). *Harmon* and *Luther* were subsequently upheld by the Michigan Supreme Court, as explained in the text.

Lovercamp adopted the court of appeals' holding in *Harmon* that a defense was available and declined to follow an earlier Michigan court of appeals case which had rejected the defense. *Lovercamp*, *supra*, 118 Cal. Rptr. at 114. *Harmon* imposed no preconditions on the availability of the defense. Rather, *Harmon* held that "To establish the defense of duress it is necessary that a defendant show that the violation of law for which he stands charged was necessitated by threatening conduct of another which resulted in defendant harboring a reasonable fear of imminent or immediate death or serious bodily harm." 220 N.W.2d at 214.

chased off the grounds at about 10:30 p.m. He testified that he tried unsuccessfully to find the duty officer. He was apprehended on the highway a few miles from the camp at 6:30 the next morning.

The trial court gave a confusing instruction to the jury, in which it outlined the traditional criteria of duress but instructed also that it was not a defense to escaping prison that the defendant fled to avoid homosexual attacks by other prisoners. The defendant was convicted. The Michigan Court of Appeals reversed, and its judgment was upheld by the State Supreme Court, which held that a defendant successfully raises the defense of duress when he presents evidence from which a jury could conclude:

"A) The threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;

"B) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;

"C) The fear or duress was operating upon the mind of the defendant at the time of the alleged act; and

"D) The defendant committed the act to avoid the threatened harm." 232 N.W.2d at 187.

In response to the state's argument that the court adopt the *Lovercamp* criteria as essential preconditions, the court held:

"To the extent that competent evidence may be produced as to any of these conditions, it is rel-

evant to the claim of duress. As such, it should be submitted to the jury. For example, should defendant be retried, evidence on the question of whether he immediately reported once having attained a position of safety from the immediate threat would be admissible as bearing upon elements (C) and (D) of the defense." 232 N.W.2d at 187 (footnote omitted).

In a case decided the same day, *People v. Harmon*, 394 Mich. 625, 232 N.W.2d 187 (1975), the court held that the fact that the defendant did not leave the prison until about 24 hours after a confrontation with inmates seeking sexual favors "does not suffice to remove the defense of duress from the consideration of the jury." "[W]hat constitutes present, immediate and impending compulsion depends on the circumstances of each case." 232 N.W.2d at 188.

The Illinois Supreme Court has similarly rejected the contention that only a "limited" duress defense is available in prison escape cases. *People v. Unger*, 66 Ill. 2d 333, 5 Ill. Dec. 848, 362 N.E.2d 319 (1977). *Unger* contains a careful discussion of the underlying principles. The defendant had walked off an honor farm and was apprehended two days later. Prior to his transfer to the honor farm, he had been threatened by another inmate in an attempt to force the defendant to engage in homosexual acts. The defendant did not report the episode for fear of retaliation.

After his transfer to the honor farm, he was assaulted and sexually molested by three inmates. The

attack occurred on March 2, 1972. Between then and March 7 when he escaped, he received more threats, the last one on the day he escaped. He did not report the threats to the prison authorities. He testified that he had escaped to save his life and that he had planned to return once he found someone who could help him.

The judge instructed the jury that the reasons given for the escape were immaterial and were not to be given any consideration by them. The court also refused to give two instructions on duress and necessity. The Illinois Court of Appeals reversed, and the state supreme court upheld its judgment. The court reviewed the history of the defenses and determined that the necessity defense was appropriate in escape cases. An Illinois statute defined necessity as follows:

"Conduct which would otherwise be an offense is justifiable by reason of necessity if the accused was without blame in occasioning or developing the situation and reasonably believed such conduct was necessary to avoid a public or private injury greater than the injury which might reasonably result from his own conduct." Quoted at 362 N.E.2d at 322.

The court found that, even though the state's evidence cast doubt on the defendants' motives for escape and upon whether it was necessary, "the defendant was entitled to have the jury consider the defense on the basis of his testimony." 362 N.E.2d at 323.

The state urged the court to apply "a more stringent test" to prison escape cases based on *Lovercamp*. As in the instant case, the state argued that the defendant had not informed the authorities of his situation and had failed to report immediately after securing a position of safety. The court rejected the argument that the "existence of each condition is, as a matter of law, necessary to establish a meritorious necessity defense," 362 N.E.2d at 323, but agreed "with the State and with the court in *Lovercamp* that the above conditions are relevant factors to be used in assessing claims of necessity." *Id.* The Court said:

"The preconditions set forth in *Lovercamp* are, in our view, matters which go to the weight and credibility of the defendant's testimony. The rule is well settled that a court will not weigh the evidence where the question is whether an instruction is justified. [Citation omitted.] The absence of one or more of the elements listed in *Lovercamp* would not necessarily mandate a finding that the defendant could not assert the defense of necessity.

"By way of example, in the present case defendant did not report to the authorities immediately after securing his safety. In fact, defendant never voluntarily turned himself in to the proper officials. However, defendant testified that he intended to return to prison upon obtaining legal advice from an attorney and claimed that he was attempting to get money from friends to pay for such counsel. Regardless of our opinion as to the believability of defendant's tale,

this testimony, if accepted by the jury, would negate any negative inference which would arise from defendant's failure to report to proper authorities after the escape. The absence of one of the *Lovercamp* preconditions does not alone disprove the claim of necessity and should not, therefore, automatically preclude an instruction on the defense. We therefore reject the contention that the availability of the necessity defense be expressly conditioned upon the elements set forth in *Lovercamp*." 362 N.E.2d at 323.

The Supreme Court of New Mexico has similarly rejected the argument, put forth by the state, that the *Lovercamp* standards are indispensable preconditions to the duress defense in escape cases. In *Esquibel v. State*, 91 N.M. 498, 576 P.2d 1129 (1978), the defendant alleged that he had suffered a prolonged history of beatings and serious threats by guards and prison personnel. The court canvassed the elements of duress as reflected in a statute, as well as state and federal cases, and concluded that it would be appropriate in escape cases. The court held:

"The defense of duress is a question for the jury. *People v. Luther, supra*. A defendant successfully raises the defense of duress when he presents evidence, as here, from which a jury could conclude that he feared immediate great bodily harm to himself or another person if he did not commit the crime charged and that a reasonable person would have acted in the same way under the circumstances. The defendant thus having established a prima facie case of

duress, the burden then shifts to the State to prove beyond a reasonable doubt that the defendant did not act under such reasonable fear." 576 P.2d at 1132.

With respect to the state's argument that *Lovercamp* stood for a more limited rule which the court should adopt, it said:

"The preconditions set forth in *Lovercamp* are, in our view, matters which go to the weight and credibility of the testimony upon which the defendant bases his prima facie case. *People v. Un-ger*, 66 Ill.2d 333, 5 Ill.Dec. 848, 362 N.E.2d 319 (1977). To the extent that competent evidence may be produced as to any of these conditions, it is relevant to both the proof and disproof of the claim of defense. *People v. Luther, supra*. Such evidence is available to the prosecution in its task of overcoming the defendant's prima facie case of duress." 576 P.2d at 1132.

The cases stand for the plain proposition that even if the defendant's explanation seems improbable or implausible it is for the jury, and not the judge, to make the determination.

The Government dismisses these decisions by saying that the courts did not evaluate the return requirement in light of the continuing character of the escape offense (Pet. Br. 34 n.21). But these courts were fully apprised of the state's contention that a failure to return should permit the trial court to take the issue away from the jury, and refused to accept

it. As was stated in a different context, the government's position "at least makes for neatness" but "[t]he trouble about such neatness is that it may work intolerable injustice in individual cases." *Lynch v. Director of Public Prosecutions*, [1975] 1 A.C. 653, 707, [1975] 1 All E.R. 913, 948-49 (1975) (H.L.) (Lord Edmund-Davies). The stringent rule urged upon the Court has been rejected precisely because the courts have recognized the harshness and potential injustice that such a rule could work in individual cases. It is not difficult to imagine a situation where a mildly retarded prisoner is threatened with homosexual rape, and escapes. He might be incarcerated hundreds of miles from family and friends. Confused and panic-stricken, he might try to make his way home to seek advice. If he later turns himself in or is captured before he gets home, under the rule urged by petitioner, he would be barred from raising the choice-of-evils defense.

A case in point is *Lovercamp* itself. Applying the Government's standard, if instead of being recaptured immediately, the young retarded woman had been at large for a few hours and then was captured or turned herself in, she would not have been able to raise the defense.³² Rather than create a procrustean test that

³² The Government's rationale for the immediate return requirement—that the danger is averted as soon as the inmate is outside the prison—does not necessarily follow. At the very least, it is unreasonable to expect a fugitive to put himself back into a situation in which the threat of immediate harm would be real

admits of no flexibility, these courts chose to place their confidence in the jury to ferret out abuses of the defense when tested by our adversarial system.

The Government argues that its reading of *Lovercamp* has been widely accepted and cites several cases in support of this statement (Pet. Br. 30). A careful reading of these cases, however, demonstrates instead a most narrow and tenuous accord with petitioner's interpretation.³³

and the defendant would have no immediate source of assistance. The respondents' case is a prime example, for they had allegedly been abused not by other prisoners, but by the guards themselves. Where the chances are great that the accused would be returned to the same facility, a question of fact is raised as to whether the immediacy of the threatened harm has ceased.

For the difficulties of guarding, or being guarded, against even a known hazard on reconfinement, see *Palmigiano v. Garrahy*, 443 F. Supp. 956, 967 (D. R.I. 1977): "One inmate testified that, shortly after his entry into the [Rhode Island Adult Correctional Institutions] in 1973 when he was 18 years old, he was gang-raped in the shower room in Maximum. Released from prison soon thereafter, he was reincarcerated in May, 1976. Within a month, he was again viciously sexually assaulted in the shower room, this time while he was in protective custody in Medium. In December, 1976, while living in a different dormitory in Medium, he was again gang-raped. He suffered a nervous breakdown."

³³In *U.S. v. Boomer*, 571 F.2d 543 (10th Cir. 1978), the issue of duress was given to the jury even though the court of appeals remarked that the facts and circumstances were such as to cast great doubt that the defendants had intended to turn themselves in if they cleared the prison wall. In *United States v. Bryan*, 591

A further justification offered by the Government in support of an absolute return requirement is that there are certain pragmatic problems endemic to the

F.2d 1161 (5th Cir. 1979), the defendant had escaped from a hospital where he was in a position of safety. Aside from not meeting any of the *Lovercamp* criteria, arguably the basic requirement of the duress defense that the individual be in immediate danger of death or serious bodily harm was missing. Significantly, the court expressly distinguishes *United States v. Bailey* on its facts.

It would take an extravagant reading of *State v. Horn*, 58 Haw. 252, 566 P.2d 1378 (1977), to find support for the government's theory. The principal issue before the court in *Horn* was whether duress is ever a defense in an escape case. In holding that the defense was available, the court adopted "the rationale and the conditions imposed by *Lovercamp*" but modified it so that a specific threat of death or serious injury is not required. The court stressed that an accused is entitled to a jury determination of his guilt or innocence as long as there is some credible evidence to support the defense. The court specifically adopts *People v. Harmon*, *supra*, in holding that the defense should have been submitted to the jury. While the court noted that an escapee must report immediately to the proper authorities when he reaches a position of safety, it apparently saw this as a jury question as well. The opinion is not altogether clear as to how long the defendants were at large, stating only that the defendants were captured shortly after intentionally escaping from the state prison. 566 P.2d at 1380. On this record, the court reversed the judgment of conviction and remanded for a new trial.

State v. Reese, 272 N.W.2d 863 (Iowa 1978), while it adopts the petitioner's interpretation of *Lovercamp*, is hardly overwhelming support for the position. The majority rejects the traditional duress doctrine in favor of a special rule for escape cases.

duress defense in escape cases. A return requirement, the Government asserts, would make clear to prisoners, who as a class have already demonstrated a willingness to break the law, that the defense would be useless to those who would use it as a perpetual defense to an escape charge. Requiring the prisoner to return, it argues, would also confirm the bona fides of the defendant's motivation for departing from custody.

Two justices dissented, and a third took no part in the decision. The dissent reviews the two lines of cases pertaining to duress in escape cases and concludes that the difference between them is "one of degree." But the critical issue dividing the court is confidence in the jury system. Justice McCormick states in dissent:

"Apart from whether the defense is to be meaningful, the issue is whether juries can be trusted to find the facts. The *Unger* rule is meaningful and is based on trust in the ability of juries to apply it. Our system depends on society's trust in juries, and history proves this trust is justified. See *Bearbower v. Merry*, 266 N.W.2d 128, 134 (Iowa 1978)." *Id.* 869-70.

Johnson v. State, 379 A.2d 1129 (Del. 1977) did not involve a threat of death or serious bodily injury: the defendant there based his defense on objectionable living conditions. The court simply states that the *Lovercamp* tests are examples of extreme situations not present in the case before the court. In *State v. Worley*, 265 S.C. 551, 220 S.E.2d 242 (1975), the escaped prisoner had remained at large for two years, after escaping to seek treatment for a case of poison ivy. Apparently there was no justification offered, and on these facts the plea of necessity was properly rejected. Even under the traditional test the court would not have been required to submit the case to the jury.

It is not self-evident why the pragmatic problems the Government describes could not equally be served by a rule that makes failure to return a relevant consideration for the jury. A flexible rule would fully address the point, which we do not dispute, that failure to report to the authorities may reflect adversely on the bona fides of the accused's motivation. But for no adequate reason, the Government would turn the failure to return into a conclusive presumption that would withdraw the question of fact from the jury's consideration.

Nor is it apparent that an absolute return requirement would better discourage those prisoners intent on escaping than would a flexible rule.³⁴ The Government has not attempted to show that the incidence of

³⁴ The Government suggests that a rash of escapes would likely ensue if the Court does not impose a return requirement as a necessary precondition to raising the defense. The same argument was made, unsuccessfully, to the Michigan Court of Appeals in *People v. Harmon*, 53 Mich. App. 482, 220 N.W.2d 212, 215 (1974), where the issue was whether the duress defense should be permitted at all in the escape context. The court said:

"We do not consider this [a rash of escapes] to be the necessary result of our decision. First, it is to be remembered that simply because an escapee alleges that he escaped to avoid homosexual attacks will not suffice to prevent a conviction. The defense, as outlined above, must be established by competent evidence in a trial where the testimony of witnesses is subjected to the scrutiny of the fact-finder who, in the course of determining the true facts of the case, would properly consider the credibility of the various witnesses. It

escapes in states which take the latter approach has risen. The scant data that exists in the states that have adopted the position urged by respondents indicate that these decisions have had no impact on

is not our function in deciding this case to judge the veracity or claims of future prisoners who might maintain that their escape was necessitated by such indignities. The credibility to be accorded such tales lies solely within the province of the fact-finder and is to be determined within the facts of each case as it arises. Secondly, our decision may well produce a result entirely opposite to that feared by the *Noble* Court. [*People v. Noble*, 18 Mich. App. 300, 170 N.W.2d 916 (1969)] If the conditions of our penal institutions have reached the point where the only recourse to free one's self from unwanted personal attacks is to flee, then any improvements made in our prisons with respect to assuring the personal safety of the inmates could only serve to eliminate from the ranks of escapees those who do so solely in an effort to protect themselves. The result, therefore, might well be fewer prison escapes rather than more.

"Human nature being what it is, defendants who have escaped from prison for reasons unconnected with those presented here will undoubtedly argue that they did so because of homosexual attacks. These claims, however, will be judged within the framework of the fact-finding process were the traditional safeguards for determining the truth of a tale will be applied. To us this is extremely more desirable than relegating the actual victims of such attacks to years more of the same treatment where no workable safeguards are employed to protect their safety."

escape rates.³⁵ Even if the Government is right that some prisoners would take the availability of a duress defense into account before deciding whether to es-

³⁵ Data compiled by the Law Enforcement Assistance Administration, the Michigan Department of Corrections and the Illinois Department of Corrections indicates that in the states of Michigan and Illinois where courts have permitted juries to consider the duress defense to the crime of escape, the floodgates have not opened. *People v. Luther*, 394 Mich. 619, 232 N.W.2d 184 and *People v. Harmon*, 394 Mich. 625, 232 N.W.2d 187 were both decided in 1975. According to the LEAA and Michigan Corrections Department, there has been no significant increase in the number of escapes since these decisions were issued. LEAA data shows that in 1974, 78 per 1,000 inmates escaped; that in 1975, 73 inmates per 1,000 escaped; in 1976, 67 inmates per 1,000 escaped; and in 1977, 68 inmates per 1,000 escaped. (National Prisoner Statistics Bulletin—U.S. Dept. of Justice—LEAA—National Criminal Justice Information and Statistics Service). (The data includes "absconders from furlough" in the definition of escape as well as "breaches of security.") The statistics compiled by the Michigan Department of Corrections do not differ significantly from the LEAA. In 1974, 73 inmates per 1,000 escaped; in 1975, 65 inmates per 1,000 escaped; in 1976, 63 inmates per 1,000 escaped; and in 1977, 68 inmates per 1,000 escaped. Annual Reports-Michigan Department of Corrections. Likewise statistics gathered by the Illinois Department of Corrections also refute the Government's unfounded fear, *People v. Unger*, 66 Ill. 2d 333, 5 Ill. Dec. 848, 362 N.E.2d 319 (1977), was decided in 1977. Since then, there has been no statistical increase in escapes. In Illinois in 1975, there were three escapes per 1,000 inmates (twenty-two escapes out of an average prison population of approximately 7,236); in 1976, there were three escapes per 1,000 inmates (twenty-two escapes out of an average prison pop-

cape, its theory cannot withstand analysis. For even under its interpretation of *Lovercamp* there are some instances where a failure to return does not preclude jury consideration. In *Lovercamp* itself, the defendant was recaptured immediately upon gaining her freedom. Under the circumstances, the court held that it was for the jury to determine whether she intended to surrender had she reached a position of safety. A prisoner who included the availability of the duress defense in his calculation before escaping would at least know that, if he were immediately recaptured, the issue of whether he intended to return would be for the jury.

The Government's final articulated concern—that prisoners might plot together to “coerce” their fellow prisoners to escape or turn themselves in if arrest seems imminent and then raise the duress defense—gives little credit to the jury system. The reality is that, absent a compelling and well-substantiated

ulation of 8,859); in 1977, there was one escape per 1,000 inmates (fourteen escapes out of an average prison population of approximately 10,221); in 1978 after the decision in *Unger*, there was still only one escape per 1,000 inmates (fourteen escapes out of an average prison population of 10,551); and in early 1979 there were zero escapes per 1,000 inmates (one escape for the first two months of 1979 out of a average prison population of approximately 10,382). (Illinois's statistics are substantially lower per 1,000 than Michigan's because they do not include absences from half-way houses, work release programs, and so forth.) All of these statistics are infirm in many ways typical of crime statistics, but they give no support to the Government's fears.

showing of abuse in a given case, a prolonged absence is likely to be viewed by the jury with a jaundiced eye. In the final analysis, “[i]t is exclusively the role of the jury, as the representative of the community, to judge the credibility of a defendant's story.” Comment, From Duress to Intent: Shifting the Burden in Prison Escape Prosecutions, 127 U. Pa. L. Rev. 1142, 1170 (1979).

For all of these reasons, the Government's contention that failure to return to custody should be an absolute bar to jury consideration of a duress or choice-of-evils defense, based on its reading of *Lovercamp* and its justifications for applying that reading to federal law, should be rejected. The trial court in this case was in error to accept that argument, and the court of appeals correctly reversed the convictions.

B. Even if a return requirement is generally a precondition to a choice-of-evils or duress defense in escape cases, it cannot be applied to sustain respondents' convictions in this case

Whatever the appropriateness of the “return requirement” as a precondition to a choice-of-evils or duress defense in escape cases, the court of appeals decided that the return requirement could not justify the refusal of the trial judge to instruct on the choice of evils defense in this case. Following the lead of *United States v. Michelson*, 559 F.2d 567 (9th Cir. 1977), it found that the return requirement “is based

on the critical assumption that escape is a 'continuing' offense, *i.e.*, that one may commit the crime of escape, even if his original departure from custody was justified, by failing or refusing to *return* to custody once the justifying circumstance is no longer present." (Pet. App. 23a.) The court of appeals accepted, *arguendo*, that escape under federal law is indeed a "continuing offense,"³⁶ but it found that "this theory was not reflected in the indictment or in the trial court's charge to the jury." (Pet. App. 24a.) Both indictment and instruction referred to an alleged escape occurring on August 26, 1976. The trial court's instruction "rather than explaining a 'continuing offense' concept to the jury, emphasized the notion that the offense took place when the appellants left the jail on August 26." (Pet. App. 25a.)

The court of appeals held that the refusal to instruct the jury on the duress defense in these circumstances violated the respondent's right to a jury trial and required that their convictions be reversed:

"In effect, the trial court denied appellants' right to have the jury consider a duress defense to the crime with which they had been charged (escaping on August 26) because the court found that they would in any event be guilty of an offense *under a theory (failure to return) that was never*

³⁶ We provide an alternate justification for the court of appeals holding in Part I(C) *infra*, where we show that the court of appeals' assumption that escape under 18 U.S.C. § 751(a) is a "continuing offense" should be rejected.

presented either to appellants or to the jury. We cannot sanction such an obvious violation of appellants' constitutional right to jury trial." Pet. App. 25a-26a (emphasis in original).

Moreover, on appeal the respondents "were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court." *Cole v. Arkansas*, 333 U.S. 196, 201 (1948). *When the jury convicted the respondents, it could only have been for the initial departure—not their continuing absence.* Respondents' convictions cannot be sustained on a "continuing absence" theory, of which they had no notice, and for which they were not convicted. *Presnell v. Georgia*, 439 U.S. 14 (1978).

In *Presnell*, the Court overturned three death sentences that had been imposed on the defendant after he had been convicted of three capital offenses—rape, kidnapping with bodily injury, and murder with malice aforethought. Under Georgia law, the death penalty could be imposed if the capital offense had been committed while the offender was engaged in another capital felony. Forcible rape was a capital felony, but statutory rape was not. Because there was no way of knowing from the verdict rendered whether the jury had convicted the defendant for forcible rape, the state supreme court had overturned two of the death sentences on the ground that the rape could not be assumed to involve the element of bodily harm.

The third death sentence rested on the murder conviction but could only be imposed if the offense had been "committed while the petitioner was engaged in the commission of 'kidnapping with bodily injury, aggravated sodomy.'" The state supreme court had upheld the death penalty "on the theory that, despite the lack of a jury finding of forcible rape, evidence in the record supported the conclusion that petitioner was guilty of that offense, which in turn established the element of bodily harm * * *." 439 U.S. at 15-16.

In reversing, this Court pointed out that "petitioner had no notice, either in the indictment, in the instructions to the jury, or elsewhere, that the State was relying on the rape to establish the bodily injury component of aggravated kidnapping." 439 U.S. at 16 n.3. This theory, therefore, could not be used by the appellate courts to sustain the conviction. By the same token, respondents here could not know that the Government would rely on the notion of escape as a continuing offense to convict them or to sustain their convictions on appeal.

This Court has recently said:

"It is axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process. *Cole v. Arkansas*, 333 U.S. 196, 201; *Presnell v. Georgia*, [439 U.S. 14]. These standards no more than reflect a broader premise that has never been doubted in our constitutional system: that a person cannot incur the loss of liberty for an offense without notice

and a meaningful opportunity to defend." *Jackson v. Virginia*, 443 U.S. ___, 47 U.S.L.W. 4883, 4885 (June 28, 1979).

The Government's arguments in defense of the trial court's ruling fly directly in the face of these principles.³⁷

It is not a sufficient response to say that the offense of escape includes failure to return and that it was unnecessary either to charge it in the indictment or to instruct the jury as to this theory. (Pet. Br. 48-49.) It is well established that an indictment is not sufficient if it states the offense in generic terms. *United States v. Cruikshank*, 92 U.S. 542, 558 (1876). "A

³⁷ The Government concedes that "it is both futile and inhumane to insist that an escaped prisoner surrender himself at once to a facility where genuinely dangerous conditions persist merely in order to preserve a defense of duress to the escape," (Pet. Br. 44), and that, accordingly, the requirement is not "failure to return" but "failure to report." (The looser requirement, see Pet. Br. 45, may be intended to avoid self-incrimination issues.) The trial court embraced a similar notion at times (App. 201, 219-20; Tr. 725, 778-79), though not in his statement in the final instructions (App. 225; Tr. 807). Thus, even assuming that the continuing offense theory had been explained properly to the jury, the respondents were entitled to an instruction on what sort of reporting was necessary or on possible justifications for failure to report. Bailey's attorney explicitly said to the court, "[A] duress instruction is appropriate as to my client, because the testimony has shown that there was and it can be interpreted by the jury, that there was a continuing duress on the part of my client." (App. 214; Tr. 771.)

cryptic form of indictment in cases of this kind requires the defendant to go to trial with the chief issue undefined. It enables his conviction to rest on one point and the affirmance of the conviction to rest on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture." *Russell v. United States*, 369 U.S. 749, 766 (1962).³⁸ These principles are equally applicable where a defendant is refused the opportunity to raise a defense to a crime which is charged because that defense would not be available on a different theory of which he is given no notice.³⁹

³⁸ See also *United States v. Carll*, 105 U.S. 611, 612 (1881) ("In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished * * *"); *United States v. Hess*, 124 U.S. 483, 487 (1888) ("Undoubtedly the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged.").

³⁹ The Government argues that, if the court of appeals is correct, in the future prosecutors will have to put in the indictment that the defendant was guilty of escape by continued absence and implies that this would work some hardship on the Government (Pet. Br. 49 n.32). When the Government goes before the grand jury, it presumably knows whether the defendant is still at large, or if already in custody, how long he was gone. It would be no hardship to put these facts before the grand jury and

In support of its claim that continuing absence need not be separately alleged or explained to the jury, the Government relies on *United States v. Michelson*, 559 F.2d 567 (9th Cir. 1977) and other lower federal court decisions (Pet. Br. 49). *Michelson* does not reveal how the indictment was framed or whether the jury was instructed on the "continuing absence" theory of escape. This specific issue was simply not raised. It is significant, however, that *Michelson* cites with approval *United States v. Chapman*, 455 F.2d 746 (5th Cir. 1972), where the jury was instructed that a voluntary failure to return to custody would be proof of one of the elements of the offense.⁴⁰ The issue addressed in the cases cited by the Government is solely whether, under § 751(a), the necessary intent could be formulated after the initial departure. See, e.g.,

include it in the indictment. The defendant would then be specifically apprised of what charge he must defend against.

⁴⁰ Chapman in effect was seeking a directed verdict of acquittal on the ground that he had been compelled to leave the prison by other inmates and did not decide to flee until later. The court held that late formation of intent could still constitute an offense under § 751(a). The jury was instructed that, if after being forced to leave custody a prisoner "on his own volition" decided to remain at large, this would constitute the crime of escape. 455 F.2d at 749. The opinion does not suggest that Chapman's evidence that he remained at large because of fear of great bodily harm from Escambia County deputy sheriffs and that he was on his way to surrender himself in Atlanta could not be considered by the jury in determining whether he voluntarily failed to return.

United States v. Woodring, 464 F.2d 1248 (10th Cir. 1972); *Chandler v. United States*, 378 F.2d 906 (9th Cir. 1967).

By parsing the words of the indictment and the jury instructions, the Government contends that the trial court in fact informed the jury as to the continuing nature of the offense of escape. (Pet. Br. 49.) While the Government contends that the words "flee" and "absent" conveyed to the jury that the offense was a continuing one (Pet. Br. 49), the common meaning of these words is to "leave" or "depart," not to "fail to return" thereafter. Juries cannot be expected to be familiar with the nuances of such terms when used in other statutes such as 18 U.S.C. § 3290 (cited, *id.*). The jury would have had to have been clairvoyant to have understood the judge's charge in the way that the Government would have this Court read it. A fair reading of the court's instructions shows that the continuing nature of the offense was simply not considered. The Government's approach, if accepted, would enable the "conviction to rest on one point and the affirmance of the conviction to rest on another." *Russell v. United States*, *supra*, 369 U.S. at 766.

The unfairness to respondents is dramatized by the Government's attempt to shift to them the blame for the narrowness of the instructions: it contends that the respondents never asked the court to inform the jury of the continuing offense aspect of the case and supports its charge by pointing out that the proposed

duress instruction focussed on the initial departure from custody. (Pet. Br. 50.) All the arguments before the trial judge had been in terms of the *Lovercamp* preconditions (if such they were) for presenting a defense of duress. If the Government had believed at trial that it was charging escape as a continuing offense, that fact would have emerged in the course of the arguments before the trial judge, and the Government, not the respondents, would have requested different instructions on the crime that was charged.⁴¹

The Government also faults the respondents for not producing more evidence relating to their failure to return. (Pet. Br. 50.) In fact, all of the respondents

⁴¹ *Henderson v. Kibbe*, 431 U.S. 145 (1977), cited by the Government, is inapposite. In *Henderson*, no instruction on causation was requested at all by the defendant. Under the circumstances, the Court placed a very heavy burden on the defendant to demonstrate prejudice. In the instant case, respondents sought an instruction on duress that was fully consistent with the theory of the prosecution's case, as they understood it.

The Government is also mistaken when it refers to "the court of appeals' 'two crime' theory." (Pet. Br. 50.) The court did not say that escape as a continuing offense was a separate crime, but only that the continued offense theory must be explained in the indictment and in the jury instruction. The court did not address whether escape and continued absence are one offense or two. Respondent Walker's contention in the court of appeals that § 751(a) creates only one crime (see Pet. Br. 50 n.33), is fully consistent with the court of appeals' treatment of the issue. In the passage quoted by the Government, he was simply arguing against escape as a continuing offense (see Part II(C) *infra*).

introduced, or in the case of Cogdell, proffered evidence explaining their actions after escape. Bailey testified that he had been in fear for his life and that if he turned himself in he would still have been under the threat of death. He also knew that, after his escape, the FBI wanted to kill him, and that the FBI had told his people that they were going to shoot him. He testified that *he did have some people call the officials at the jail on several occasions*; this was never rebutted by the prosecution. He understood that, if he went back, he would have been returned to the Northeast One section of the New Detention Center and that the guards would have been the same ones who were there before he left.

Walker testified that he had contacted the FBI on no less than three occasions. According to his testimony, he had learned that the FBI had said that, if they found him, they would kill him (App. 195; Tr. 710). He was also concerned that if he surrendered he would be sent back to the D.C. Jail, where he would be subjected to the same conditions he had just left (App. 196, 198; Tr. 712, 719). His contacts with the FBI were to gain assurances that he would not be harmed and that he would not have to go back to the D.C. Jail (*id.*). While the FBI agreed that he would not be harmed by its agents if he turned himself in, it would give no assurance that he would not be returned to the New Detention facility (App. 200; Tr. 722).

Cooley did not personally call the authorities because he did not know who to call and because he feared for his life (App. 119; Tr. 408). He thought he would be shot when they came to get him (*id.*). Nevertheless, he testified that when he got home his people unsuccessfully attempted to get in touch with the authorities (*id.*).

Cogdell, while he did not testify, made a proffer that the duress "was a continuing process prior to my leaving, during, and also after I returned to the District of Columbia Jail." (App. 230; Tr. 13.) He told the court that he might be able to show that he wrote letters but the court ruled that, "If you can't meet the fifth [*Lovercamp* condition] you can't eat." *Id.* (*sic*).

"It is rightfully the province of the jury as the trier of fact, and not the trial judge, to consider whether there were circumstances justifying the defendants' failure to return." Comment, 127 U. Pa. L. Rev., *supra*, at 1147-48. Furthermore, at a new trial respondents will have the opportunity to explain further their failure to return and additional witnesses may be located.⁴²

⁴² For example, Bailey testified that he had had "jail officials" called. (App. 175; Tr. 587.) Late in the trial, Bailey's attorney advised the court that he had attempted to locate witnesses who would corroborate Bailey's assertion "that he made some type of contact with the FBI." (Tr. 767; *sic*.) He had been unsuccessful in reaching Bailey's mother. He did speak, over the telephone, with one Jean Gore and was of the impression that she would

Respondents had the right to be informed in advance, and to have the jury informed, as to the Government's theory of the crime. They had the right to make a defense to the crime with which they were charged. They have the further right to have the validity of their convictions reviewed on the same theory upon which the jury convicted them. For all of these reasons, the judgment of the court of appeals must be affirmed.

C. Failure to return to custody after an initial departure is not a violation of the federal escape statute

The court of appeals correctly concluded that the trial court's refusal to instruct on the defense of duress or choice of evils had the effect of convicting respondents of escape under a theory—failure to return to custody—that was never reflected in the indictment or presented to the jury, and it reversed the

not support Bailey's testimony on this point. He had asked her to come to the courthouse but she did not appear. (Tr. 767-768.)

Thus, Bailey's mother, who might have provided corroboration, was never located. Jean Gore, who was only interviewed over the telephone, may have been confused by the fact that she was apparently asked about her efforts to contact the FBI on Bailey's behalf when in fact Bailey had testified that he had had "jail officials" called. It should further be noted that Bailey's counsel was appointed only shortly before the trial (Pretrial Tr. at 4-5) and understandably may not have had the opportunity to interview all potential witnesses prior to trial.

convictions for that reason (Pet. App. 25a-26a). We have defended the approach of the court of appeals in Part B above. It is an alternative ground for affirming the judgment of the court of appeals that the theory of escape as encompassing failure to return to custody is an unwarranted and improper expansion of 18 U.S.C. § 751(a). Respondents' conduct in failing to return was unlawful only if Congress made it so—that is, only if § 751(a) makes escape a continuing offense, rather than one that is accomplished at a single point in time, or in a single, limited period of time.⁴³ An examination of the common understanding of the crime of escape at the time of enactment of the federal escape statute, and this Court's decisions on when it is appropriate to construe a statute as creating a continuing offense, makes clear that escape is not a continuing offense and that the district court accordingly had no power to penalize respondents for not returning.

1. The offense of "escape" was not commonly known as a continuing offense at the time of the enactment of the federal escape statute

When the legislature enacts a criminal statute prohibiting conduct in words that already have legal significance, the words retain that definition unless there

⁴³ See *Sanabria v. United States*, 437 U.S. 54, 69 (1978); *Ex Parte United States*, 242 U.S. 27, 43, 52 (1916); *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820); cf. *Easter v. District of Columbia*, 124 U.S. App. D.C. 33, 361 F.2d 50, 53 (1966).

is clear evidence of a contrary legislative intent. *Morissette v. United States*, 342 U.S. 246, 263 (1952). Thus, because 18 U.S.C. § 751(a) nowhere defines the term "escape," the word is presumed to outlaw no more conduct than did its common law and statutory antecedents.

No federal statute prohibiting escape existed before 1930 when Congress passed an act for the reorganization of the administration of federal prisons and related purposes. Act of May 14, 1930, c. 274, 46 Stat. 326. Section 9 of this act prohibited escapes and attempted escapes while serving a federal criminal sentence.⁴⁴ See *United States v. Brown*, 333 U.S. 18, 21 (1948) (noting common law origins of offense). An examination of court decisions prior to 1930 indicates

⁴⁴ Prior to the Act of May 14, 1930, there had been federal statutes relating to escape, but they did not prohibit the act of escape itself. See Act of June 21, 1860, c. 164, 12 Stat. 69 (misdemeanor punishable by two years or \$2000 for an officer to "voluntarily suffer" a federal prisoner to escape); Rev. Stat. § 5409 (to same effect); Act of March 4, 1909, c. 321, § 138, 35 Stat. 1113 (to same effect); *id.*, § 141, 35 Stat. 1114 (misdemeanor to "directly or indirectly, aid, abet, or assist any person to escape" from the custody of an officer holding him in federal custody).

After enactment of the Act of May 14, 1930, Congress made escape from two specific institutions a crime in another statute, Act of May 27, 1930, c. 339, § 9, 46 Stat. 390. The Act of May 14, 1930, was amended by the Act of August 3, 1935, c. 432, 49 Stat. 513, to cover persons escaping from custody prior to conviction. In the criminal code codification of 1948, the Act of May 14, 1930, as amended, 18 U.S.C. § 753h (1940), and the Act of

that the offense of escape was thought to cover only the actual departure from lawful confinement, and not cover the escapers' subsequent decision to remain at large. The states outlawed only "[t]he physical act" which was "the departure of the prisoner." See R. Perkins, *Criminal Law* 504 (2d ed. 1969).

Over the years prior to the enactment of the federal escape statute, state courts called upon to define the offense of escape repeatedly made reference only to the prisoner's actual departure from lawful custody. In 1890, the Supreme Court of North Carolina recited the most common definition when it held that an escape occurs "'when one who is arrested gains his liberty before he is delivered in due course of law.'" *State v. Ritchie*, 107 N.C. 857, 12 S.E. 251 (1890) (quoting 1 Russell on Crimes 467). Similar definitions appeared in many other pre-1930 cases. See, e.g., *Haupt v. State*, 100 Ark 409, 140 S.W. 294, 296 (1911) ("[w]hen the prisoner goes away from his place of lawful custody"); *Whitaker v. Commonwealth*, 188 Ky. 95, 221 S.W. 215, 216 (1920) ("departure by a prisoner from lawful custody before his discharge by

May 27, 1930, 18 U.S.C. § 909 (1940), were superseded by 18 U.S.C. § 751, with that provision taking over the substance of 18 U.S.C. § 753h (1940) with minor amendments. Act of June 25, 1948, c. 645, 62 Stat. 683. See H.R. Rep. No. 304, 80th Cong., 1st Sess. at A67 (April 24, 1947).

Section 751, now 18 U.S.C. § 751(a) (1976), has been the subject of minor amendments since 1948.

process of law"); *State v. Sutton*, 170 Ind. 473, 84 N.E. 824, 826 (1908) ("where one who is under arrest gains his liberty before he is delivered by the course of the law"); *Hefler v. Hunt*, 120 Me. 10, 112 A. 675, 677 (1921) ("departure of a prisoner from custody before he is discharged by due process of law"). See generally Annot., 10 A.L.R. 148 (1921) (citing cases). All of these definitions focus on the physical act of departing custody in defining an escape. Such a definition is inconsistent with the idea that a fugitive is committing the same crime as long as he remains at large.

Two courts used similar definitions to hold that a prisoner who left his place of confinement but did not get beyond the prison grounds was guilty of an escape, and not merely an attempted escape, because he had unlawfully left the limits of his confinement, and the crime was complete. See *People v. Quijada*, 53 Cal. App. 39, 199 P. 854 (1921) ("common legal definition * * * means a violation * * * of some lawful custody"; when prisoner went beyond prescribed limits, he "violated his lawful custody"); *State v. Cahill*, 196 Iowa 486, 194 N.W. 191, 193 (1923) ("escape was complete * * * when he opened the unlocked door of the cell and went, as he claimed to have done, to another part of the prison").

It becomes even more clear that escape was not considered a continuing offense before 1930 from an examination of the cases dealing with charges of aiding an escape. At least two courts—one federal—held

that in order to be convicted of aiding a prisoner to escape, the alleged accomplice must give aid before the prisoner is out of custody, because after that time the escape is complete.⁴⁵ In *Orth v. United States*, 252 F. 566 (4th Cir. 1918), the defendant was charged with aiding a prisoner who had escaped from the federal penitentiary in Atlanta, Ga., pursuant to the Act of March 4, 1909, c. 321, § 141, 35 Stat. 1114 (see note 44 *supra*). The defendant apparently had concealed and assisted the prisoner when he appeared over three weeks later in Charleston, S.C. He moved for a directed verdict of acquittal, the motion was denied, and he was convicted. But the circuit court of appeals reversed:

"The evidence furnished no foundation for conviction of the charge of aiding [the fugitive] to escape from lawful custody. *When the physical control has been ended by flight beyond immediate active pursuit, the escape is complete.* After that aid to the fugitive is no longer aiding his escape. * * * The evidence is clear that [the fugitive] had escaped altogether from the Atlanta penitentiary, and was at large entirely free from custody for some days before the defendant * * * rendered him assistance in Charleston." 252 F. at 568 (citations omitted, emphasis added).

Thus the circuit court clearly viewed the escape as having been completed once the offender was free.

⁴⁵ This did not mean that the accomplice necessarily went free, because he could still be convicted on charges of harboring a fugitive.

The Georgia Court of Appeals reached a similar conclusion in *Harvey v. State*, 8 Ga. App. 660, 70 S.E. 141 (1911), when it held: "To authorize the conviction of one charged with aiding a prisoner to escape, * * * the evidence must establish the fact that the prisoner *was in the act of escaping*." *Id.* (emphasis added).

All in all, we have not found a single state case prior to 1930 in which an appellate court approved a conviction under a general escape statute based on the failure to return subsequent to an initial departure from custody.⁴⁶ The evidence thus indicates that the

⁴⁶ One case apparently to the contrary in fact supports the general proposition. In *Smith v. State*, 6 Ga. App. 297, 68 S.E. 1071 (1910), the court affirmed a conviction for aiding and abetting an escape based on conduct subsequent to an escape. The fugitive had escaped from a chain gang. "Later in the day," and still in shackles, the fugitive met the defendant, who furnished an ax with which the fugitive cut the shackles. The court stated the general rule as to the completion of escapes as follows: "As to escapes from the personal custody of officers, the offense is complete whenever the prisoner gets entirely away. So long as the pursuit is in progress and the fleeing prisoner is in sight of the officers or posse, the escape is not complete; but when he outruns them, or successfully eludes them and gets away, the escape is complete, and thereafter the offense of aiding an escape cannot attach to that particular transaction." 68 S.E. at 1072. The court concluded, however, that the rule as to escaping from a chain gang was different, partly because of the nature of the constructive confinement, and partly because the statutory language making escape from a chain gang an offense required that

common understanding of the crime of escape in 1930, when Congress enacted the federal escape statute, was that escape was not a continuing offense.

2. The offense of "escape" under 18 U.S.C. § 751 is not a continuing offense under accepted canons of statutory construction

Criminal statutes are subject to strict standards of construction against the government. *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820); 3 Sutherland's Statutory Construction § 59.03 (4th ed. C. Sands, 1973). As a corollary this Court has announced a strong presumption against construing a statute as creating a "continuing offense." It said in *Toussie v. United States*, 397 U.S. 112, 115 (1970), that "the doctrine of continuing offenses should be applied in only limited circumstances." An examination of *Toussie* and of this Court's other decisions construing the continuing offense doctrine makes clear that the instant case does not fit any of those "limited circumstances," and that escape under 18 U.S.C. § 751(a) should therefore not be considered a continuing offense.

Toussie involved a prosecution under Section 3 of the Universal Military Training and Service Act, 65

the fugitive "be thereafter retaken" and thus "seems to make the retaking of the prisoner a part of the crime." *Id.* The court concluded that the legislature had intended to "make the crime of escaping from a chain gang a continuous act, never finally completed * * * until the time of recapture." *Id.*

Stat. 76, for failure to register for the the draft. Regulations promulgated under the Act required all male citizens to register within five days of their eighteenth birthday. Toussie was indicted nearly eight years after he turned eighteen. The statute of limitations applicable to such prosecutions was five years. The government contended that the duty to register continued until age 26—the upper age limit in the statute creating the duty to register—and the defendant contended that the statute of limitations began to run five days after the eighteenth birthday. Thus the Court was faced with an explicit question as to whether failure to register constituted a continuing offense.

The Court pointed out that “the doctrine of continuing offenses should be applied in only limited circumstances,” and held that a given offense should not be construed as a continuing one “unless the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one.” 397 U.S. at 115. Examining the statute and the legislative history in the light of these principles, the Court held that failure to register is not a continuing offense because the Act required a man to “register at a particular time” so that “his failure to do so at that time is a single offense.” *Id.* at 119.

By contrast, in the cases in which this Court has held offenses to be continuing ones, the evidence of

Congressional intent has been so strong as to make the conclusions virtually self-reliant.

In *United States v. Cores*, 356 U.S. 405 (1958), the question was whether 8 U.S.C. § 1282(c), which punishes “[a]ny alien crewman who willfully remains in the United States in excess of the number of days allowed” in his conditional landing permit, created a continuing offense. The Court held that it did, based on the statutory language that clearly “proscribed * * * the affirmative act of willfully remaining.” 356 U.S. at 408. Thus the statute in question by its terms made the offense a continuing one, since the act of “remaining” continues until the offender leaves. This is unlike the situation in *Toussie*, for example, where the statute by its terms created a “duty * * * to present [one’s self] for and submit to registration.” That act could only be performed during a limited statutorily prescribed period. See 397 U.S. at 113.

When the Court held in 1910 that under proper circumstances the crime of conspiracy could be a continuing offense, *United States v. Kissell*, 218 U.S. 601 (1910), Justice Holmes observed that “the mere continuance of the result of a crime does not continue the crime,” citing *United States v. Irvine*, 98 U.S. 450, 451-52 (1878). He concluded, however, that it would be “a perversion of natural thought and of natural language” for the Court to conclude other than that a conspiracy could continue in time. 218 U.S. at 607. *Kissel* involved antitrust charges against several sugar refining companies, and the Court pointed out that

a conspiracy in restraint of trade "continues up to the time of abandonment or success." *Id.* at 608. So, again, it was clear from the nature of the offense that it was a continuing one.

In *In re Snow*, 120 U.S. 274 (1887), the Court held that the offense of cohabitation with more than one woman was a continuing offense: "It is, inherently, a continuous offense, having duration; and not an offense consisting of an isolated act." *Id.* at 281. The crime with which the defendant was charged was cohabitation, which would appear, as a common-sense notion, to be repeated as long as the defendant is cohabiting; he was not charged with the act of marrying more than one woman, which arguably would not have been a continuing offense. The indictment, moreover, expressly charged the defendant with "continuously" cohabiting with more than one woman. *Id.*

All of these decisions make clear that the Court is extremely reluctant to hold any offense to be a continuing one, absent powerful evidence that Congress intended it to be so and worded the statute accordingly. The statute speaks only of "escape from custody," words that, read most naturally, refer only to the act of departing from custody. It does not mention or allude to the decision to remain at large thereafter.⁴⁷

⁴⁷ In this respect, it is more like *Toussie*, which involved a statute that created a duty to register at a particular time, but did not mention or further penalize continuing failure to register

Furthermore, even if there is a question as to whether the offense is a continuing one, this Court has a "long-established practice of resolving questions concerning the ambit of a criminal statute in favor of lenity." *Dunn v. United States*, 60 L. Ed. 2d 743, 754 (June 4, 1979). "This practice reflects not merely a convenient maxim of statutory construction. Rather, it is rooted in fundamental principles of due process, which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited. * * * Thus, to ensure that the legislature speaks with special clarity when marking the boundaries of criminal conduct, the courts must decline to impose punishment for actions that are not 'plainly and unmistakably' proscribed." *Id.* (quoting *United States v. Gradwell*, 243 U.S. 476, 485 (1917); other citations omitted); see *Rewis v. United States*, 401 U.S. 808, 812 (1971) ("ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity"); *Bell v. United States*, 349 U.S. 81, 83 (1955) (same); *United States v. Universal Corp.*, 344 U.S. 218, 221-22 (1952) ("when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress

after the time had lapsed, than it is like *Cores*, in which the statute by its terms penalized "remaining" after a permit had expired, or like *Snow*, in which the offense of cohabitation by its very definition is something more than an isolated act.

should have spoken in language that is clear and definite.") If this established "rule of lenity" is applied to 18 U.S.C. § 751(a), the only proper conclusion is that a prisoner can be punished only for the act of departing from custody.

The crime of escape has repeatedly been defined simply as an unauthorized departure from custody.⁴⁸ The widespread understanding of the offense when Congress enacted the first federal escape statute in 1930 was that the crime was committed by departing from custody, not by remaining absent thereafter. Nothing in the sparse legislative history of the 1930 Act, or any of the subsequent provisions, indicates that Congress ever had a different understanding of "escape."⁴⁹ Respondents committed the crime of escape under § 751(a), if at all, when they left the jail on the morning of August 26, 1976. The statute does not by its terms authorize the punishment for any other

⁴⁸ See pp. 82-88, *supra*.

⁴⁹ Congress has found it necessary to refine the definition of the crime of escape in another context. In the Act of September 10, 1965, Pub. L. 80-176, § 1, 79 Stat. 674, Congress authorized the Attorney General to "extend the limits of the place of confinement of a prisoner as to whom there is reasonable cause to believe he will honor his trust," by authorizing him, under prescribed conditions, to visit dying relatives, attend funerals, obtain medical services not otherwise available, contact prospective employers and so forth. The prisoner could be authorized, in addition, to take part in work release programs. See 18 U.S.C. § 4082(c). To ensure that individuals violating the

act, and in the light of the above cases, should not be construed to do so.

3. Federal cases stating that escape under § 751(a) is a continuing offense should not be followed

According to the Government, "The courts are in agreement * * * that escape under 18 U.S.C. 751(a) is a continuing offense and that, even though an inmate's initial flight from prison may have been excusable, his continued absence from custody is itself sufficient to constitute the crime." (Pet. Br. 32.) The Government cites seven cases for this proposition.⁵⁰

terms of their furlough could be prosecuted for escape, 18 U.S.C. § 4082(d) provides specifically:

"The willful failure of a prisoner to remain within the extended limits of his confinement, or to return within the time prescribed to an institution or facility designated by the Attorney General, shall be deemed an escape from the custody of the Attorney General punishable as provided in chapter 35 of this title [which includes § 751]."

We note, in addition, that the Model Penal Code chose specific language in its definition of escape: "unlawfully removes himself from official detention or fails to return to official detention following temporary leave granted for a specific purpose or limited period." American Law Institute, Model Penal Code § 242.6 (Proposed Official Draft, 1962). See also § 208.33 (Tentative Draft No. 8, 1958).

⁵⁰ *Chandler v. United States*, 378 F.2d 906 (9th Cir. 1967); *United States v. Coggins*, 398 F.2d 668 (4th Cir. 1968); *United States v. Chapman*, 455 F.2d 746 (5th Cir. 1972); *United States v. Woodring*, 464 F.2d 1248, 1250 (10th Cir. 1972); *United States*

This array of authority, however, includes a number of distinguishable or irrelevant cases and does not include a single discussion of the background of the federal escape statute or of the considerable body of Supreme Court law on continuing offenses.⁵¹ We believe, accordingly, that it is entitled to little weight in this Court.

v. *Spletzer*, 535 F.2d 950, 954 (5th Cir. 1976); *United States v. Cluck*, 542 F.2d 728, 732 (8th Cir.), cert. denied, 429 U.S. 986 (1976); *United States v. Michelson*, 559 F.2d 567 (9th Cir. 1977).

⁵¹ The earliest of the cases, *Chandler v. United States*, 378 F.2d 906 (9th Cir. 1967), is the ultimate authority on which the others rely. The main issue in that case was not the continuing offense point at all, but whether the trial court erred in permitting the prosecution to introduce evidence on the question of whether the dump truck in which the defendants were riding at the time of their arrest was stolen. *Id.* at 907. The court's statement that intent to escape could be formed subsequent to a departure from custody was made without any analysis whatsoever and without any citation to authority whatsoever. See *id.* at 908. In particular, the *Chandler* court did not discuss any of this Court's cases on the continuing offense doctrine.

United States v. Chapman, 455 F.2d 746 (5th Cir. 1972), concluded that an individual who had departed the grounds of the prison was still in custody for the purposes of a charge of escape. *Id.* at 749-50. The *Chapman* court, like the *Chandler* court, failed to cite a single case in support of its conclusion.

In *United States v. Cluck*, 542 F.2d 728 (8th Cir.), cert. denied, 429 U.S. 986 (1976), the court again provided no analysis in support of its statement (a brief one in a long opinion devoted to other issues) that "it is settled" that the requisite intent may be formed subsequent to actual departure from custody, and it did

For all of these reasons, respondents contend that escape is not a "continuing offense," and that the

not cite any of this Court's decisions construing the continuing offense doctrine. Of the four cases it did cite, two of them were *Chapman* and *Chandler*. The other two, *United States v. Woodring*, 464 F.2d 1248 (10th Cir. 1972), and *United States v. Coggins*, 398 F.2d 668 (4th Cir. 1968), are off point. *Coggins* dealt with an inmate on furlough, hence his prosecution was pursuant to the differently worded 18 U.S.C. § 4082 (d), discussed in note 49 *supra*, and the only issue was the willfulness of his conduct. In *Woodring*, defendant was at an Honor Farm, so the prosecution also may have been pursuant to 18 U.S.C. § 4082(d); there too, the issue was the willfulness of the failure to return. See also *United States v. Joiner*, 496 F.2d 1314 (5th Cir. 1974), cited by the court of appeals (Pet. App. 10a n.17), another case of an inmate failing to return from furlough, where the issue was willfulness.

Another case cited by the Government, *United States v. Spletzer*, 535 F.2d 950 (5th Cir. 1976), also appears to be a § 4082(d) case. It was won by the defendant, when the court ruled that the Government had not proved specific intent (held to be the law of the case because of the instructions). The court examined evidence of intent for a period of less than 24 hours after defendant was due to return.

United States v. Michelson, 559 F.2d 567 (9th Cir. 1977), like *Cluck*, simply relies on *Chandler*, *Chapman*, and *Woodring*, with no discussion of this Court's cases on the continuing offense doctrine. *United States v. Bryan*, 591 F.2d 1161 (5th Cir. 1979), briefly relies on *Michelson* for the appropriateness of denying a duress instruction because of failure to return.

Another recent case, *United States v. Boomer*, 571 F.2d 543 (10th Cir. 1978), is a case of attempted escape.

trial court's refusal to instruct on the duress or choice-of-evils defense because respondents did not return to custody was erroneous because the failure to return had not been made criminal by Congress.⁵²

D. The question of the immediacy of the harm is not properly before the court but, assuming the court finds that it is, the record contains sufficient evidence of threats of immediate harm to create a question of fact for the jury

The Government argues that there is insufficient evidence that the threat of harm was imminent at the time respondents escaped and that this should, as a matter of law, preclude them from raising the choice-of-evils defense (Pet. Br. 35-42). As the Government itself points out (Pet. Br. 37 n.25), however, there is substantial difficulty in advancing this argument in this forum. It is perfectly clear that the trial judge was prepared to give the instruction on duress but for the failure of the defendants to return to custody. (App. 219-220; Tr. 778-79.) The Government did not brief this issue in the court of appeals or in its petition for rehearing and suggestion for rehearing *en banc*. The issue arises, if at all, only because the dissent argued that the immediacy requirement had not been

⁵² This does not mean that evidence of a failure to return is irrelevant to a defendant's state of mind at the time of an escape or to whether a genuine choice of evils precipitated his departure. But these are questions for the jury.

met (Pet. App. 63a-64a). The majority felt compelled to respond to this in a footnote (Pet. App. 21a n.39). While stressing that the trial court was clearly correct, the court of appeals noted in passing that an inflexible immediacy requirement is particularly inappropriate for escape cases where the opportunity to escape may not coincide in time with the latest threat or attack.

The Government admits that its "principal focus" in opposing the duress instruction was the failure to return. (Pet. Br. 37 n.25.) In fact, it was the only focus. The Government's failure to preserve this issue should prevent it from raising it now. In any event, it is apparent that the court of appeals gave the issue only cursory attention. Under the circumstances it would be a departure from normal appellate procedure for this Court to embark on a weighing of the evidence to determine, in the first instance, whether sufficient evidence of immediacy was introduced to present a question of fact for the jury.

Assuming the issue is properly before the Court, it is clear that the immediacy of the threat cannot be disposed of as a matter of law. In a nutshell, the Government's argument appears to be that, unless the prisoner's "back is to the wall," the defense is unavailable. This is contrary to common sense and to the better reasoned American and English authorities.

What constitutes present, immediate and impending compulsion depends upon the circumstances of each case. *People v. Harmon*, 394 Mich. 625, 232 N.W.2d 187, 188 (1975) (escape 24 hours after confrontation); *People v. Richter*, 54 Mich. App. 598, 221 N.W.2d 429 (1974) (three-week interval between threatening incident and escape); *People v. Trujillo*, 586 P.2d 235 (Colo. Ct. App. 1978) (five-month period of threats of homosexual attack lend credence to final threat to "bring back drugs or don't return"); *Esquibel v. State*, 576 P.2d at 1132 (threat 24-72 hours before escape).⁵³ Note, Duress and the Prison Escape: A New Use for An Old Defense, 45 S. Cal. L. Rev. 1062 (1972). Whenever there is any evidence to support the defense it has been left to the jury to decide. *United States v. Vigol*, 2 U.S. (2 Dall.) 346 (C.C.D. Pa. 1795); *D'Aquino v. United States*, 192 F.2d 338, 357-58 (9th Cir. 1951), *cert. denied*, 343 U.S. 935 (1952); *Hill v. State*, 135 Ga. App. 766, 767, 219 S.E.2d 18, 19 (1975); *R. v. Gill*, [1963] 1 W.L.R. 841, 845, [1963] 2 All E.R. 688, 690 (Crim. App.) Where a contrary

⁵³ In *Esquibel*, *supra*, the trial court and the state court of appeals had regarded the defendant's testimony of a long history of serious threats and beatings by guards as insufficient as a matter of law to present a jury issue as to immediate danger of death or serious bodily harm. The state supreme court concluded that "[w]hat constitutes present, immediate and impending compulsion depends on the circumstances of each case," 576 P.2d at 1133, and on the record, "a jury might conclude that the defendant acted under a genuine fear of great bodily harm to himself." 576 P.2d at 1132.

rule has been followed, great injustice has resulted. *State v. Green*, 470 S.W.2d 565, 568 (Mo. 1971) (Seiler, J., dissenting), *cert. denied*, 405 U.S. 1073 (1972).

There is a pronounced trend to relax the immediacy requirements under American and English law. This approach evolved out of a recognition that long and wasting pressure may have a greater coercive effect on the will than a threat of immediate destruction.⁵⁴

⁵⁴ The comment to the Model Penal Code § 2.09 (Tent. Draft No. 10, 1960), pp. 7-8, states:

"Beyond this limitation to coercive force or threats against the person, we perceive no valid reason for demanding that the threat be one of death or even of great bodily harm, that the imperiled victim be the actor rather than another, or that the injury portended be immediate in point of time. It is sufficient, in our view that factors such as these be given evidential weight, along with all the other circumstances, in application of the statutory standard. They must be weighed, of course, together with the actor's conduct in succumbing to the pressure they exert, since men of reasonable firmness surely break at different points depending on the stakes that are involved. We think it obvious that even homicide may sometimes be the product of coercion that is truly irresistible, that danger to a loved one may have greater impact on a man of reasonable firmness than a danger to himself, and, finally, that long and wasting pressure may break down resistance more effectively than a threat of immediate destruction. The draft is framed on these assumptions." (Footnotes omitted)

See also, Note, Have The Doors Been Opened?—Duress and Necessity Defense to Prison Escape, 54 Chi-Kent L. Rev. 913, 933 (1978).

In the leading English case of *R. v. Hudson & Taylor*, [1971] 2 Q.B. 202, [1971] 2 All E.R. 244, the defendants were prosecuted for perjury after they failed to identify a defendant in a criminal trial contrary to statements previously given to the police. Their defense was duress, based upon the fact that they had been threatened with serious injury if they testified. The court held:

"In the present case the threats of Farrell were likely to be no less compelling, because their execution could not be effected in the courtroom, if they could be carried out in the streets of Salford that same night. Insofar, therefore, as the recorder ruled as a matter of law that the threats were not sufficiently present and immediate to support the defense of duress we think that he was in error. He should have left the jury to decide whether the threats had overborne the will of the appellants at the time when they gave the false evidence." [1971] 2 Q.B. at 207, [1971] 2 All E.R. at 247.

This approach is particularly appropriate in the context of the prison environment. Note, 54 Chi.-Kent L. Rev., *supra*, at 922-25. The nature of the prison environment mandates that the immediacy requirement to the duress defense be applied flexibly. Unlike other situations in which individuals commit criminal offenses under duress, the prison setting is not one in which an inmate can readily flee from any threatened harm. As the court of appeals noted (Pet. App. 21a n.39), the opportunity to escape is unlikely ever to

coincide or immediately follow a threat or attack. Accordingly, if a prisoner has in fact been threatened by another person or by some prison condition, he knows that the threat could strike again at any time without warning and that he will be helpless. If the coercive threat is from guards, he knows that they have access to him at all hours of the day and night. Even if his assailants are other prisoners, he may have little idea when or where they may strike. See, e.g., *State v. Horn*, 58 Haw. 252, 566 P.2d 1378 (1977); *People v. Trujillo*, *supra*.

Not only are prisoners physically unable to remove themselves from a threat or force that poses a danger to their safety, they may be in a situation where corrections officials are unable or unwilling to provide them with adequate protection. See, e.g., Note, Duress and the Prison Escape: A New Use for an Old Defense, 45 S. Cal. L. Rev. 1062, 1072 (1972). Furthermore, a prisoner confronted with a serious threat of bodily harm may be in a tragic double bind. If he publicly seeks assistance from corrections officials and accuses another prisoner, or another correctional official, of threatening him, he may face an even more serious threat in the form of retaliation. See D. Cressey, "Adult Felons in Prison," in *Prisons in America* (L. Ohlin ed. 1973).

Finally, a prisoner may be exposed to long lasting, unrelenting pressure of threatened harm, the impact of which may be as great as a threat of specific, immediate harm.

The Government seems to recognize that the prison environment requires some relaxation of a strict immediate harm requirement (Pet. Br. 42), but it argues that the evidence concerning immediacy was so insubstantial in this case as not to warrant consideration by the jury. This argument cannot be squared with the voluminous testimony concerning conditions and occurrences at the jail, unless substantial portions of the defense evidence is disbelieved and reasonable inferences from that evidence disallowed.

According to that evidence all the respondents were in danger from the fires that were permitted to burn out of control in Northeast One. The jury could have found that fires were set both by inmates and correctional officers (App. 96, 100, 102; Tr. 371, 378, 381); that this was a regular occurrence *on a daily basis between August 1 and August 26* (App. 34, 35, 100; Tr. 150, 152, 377); that the guards let the fires burn (App. 41; Tr. 161-62); and that on at least one occasion a fire was allowed to burn for 24 hours (App. 124; Tr. 415); that there was no ventilation since the windows were closed and the air conditioning system was broken (App. 42, 164; Tr. 163, 547); that the fires were fueled by blankets and sheets or by plastic trash bags (App. 104; Tr. 381); that the smoke from these fires posed a threat to the lives and safety of inmates due to smoke inhalation; and that the corrections officials knew about this situation and did nothing to correct it (App. 56-57, 209; Tr. 206-08, 749). Walker introduced evidence of a history of epileptic seizures and

evidence that he had received inadequate treatment for this condition at the jail.⁵⁵

Finally, there was copious evidence of threats and beatings which extended into August.⁵⁶ Bailey testified that numerous threats had been made against him by prison guards concerning his testimony in the *Brad King* case (App. 145; Tr. 473).⁵⁷ Garland Hines testified that Bailey had been attacked by guards in the second week in August (App. 110; Tr. 393). Oliver Boling described an attack on Bailey in early August (App. 94; Tr. 368).

Cooley had also been threatened and beaten on several occasions. Garland Hines testified that he saw Captain Dickinson, Officer Webb and some unidentified guards enter Cooley's cell in early August. At

⁵⁵ See pp. 10-20 *supra*.

⁵⁶ The inmate witnesses who testified at trial were unable to give exact dates for these incidents. As Wilson said, "My day can't be processed up to the exact date * * *." (App. 46-47; Tr. 170.) Respondent Bailey testified that while at the jail he had no calendar, no date book, and no watch. In response to his trial counsel's question, "[W]ho keeps the days and the times for you, sir?", Bailey said: "Well, I don't worry about them, * * * I have been in jail a little while, you know. I don't keep track of time, you know, like that." (App. 176; Tr. 589.) Most of the witnesses, however, were able to pinpoint late July and the month of August as the time frame within which the beatings and threats occurred (App. 46, 47, 104, 105, 107, 112, 113, 185; Tr. 170, 384, 385, 389, 396-99, 630).

⁵⁷ Walker had been brought to the District of Columbia to testify in this same trial.

that time Dickinson threatened to kill Cooley if "another fire's set tonight or any other time" (App. 107; Tr. 389). Cooley was able to place the date of one attack on him as August 9 because he had been in court that day. Officer Brown and six other officers beat Cooley with plastic flashlights and pushed him to his cell (App. 116-17; Tr. 403-04).

This evidence is plainly sufficient to go to the jury on the standard that is apparently acceptable to the Government—"some reasonable temporal relationship between the threatened injury and the commission of the illegal act" (Pet. Br. 42)—and on any standard that takes reasonable account of the prison environment. The Government's contention that there was an "undisputed lapse of *several weeks* between the alleged fires, threats, and assaults and respondents' flight" (*id.*) is incorrect. In any event, threats once made have a continuing menace. *Subramanian v. Public Prosecutor*, [1956] 1 W.L.R. 965 (P.C.) All in all, the Government asks this Court to resolve a factual dispute concerning actual occurrences of controverted events and concerning whether there was a reasonable temporal relationship between the threatened injuries and the flight from jail. Such a determination would invade the province of the jury. The Government offers no good reason why the jury cannot perform its customary function of weighing the evidence in this case.

In neither court below did the Government press or argue at length this issue relating to the adequacy of

the evidence of immediate harm. To the extent that either court below considered the matter, the Government's position was rejected with little comment. This Court is not the proper forum to argue such an issue for the first time.

II

The Crime of Escape Under Federal Law Requires an Intent to Avoid Confinement

A. Introduction

The Government's analysis of the intent issue (Pet. Br. 51 *et seq.*) begins with the observation that at common law only an unauthorized departure from lawful custody had to be shown to establish the crime of escape and proceeds to a discussion of the federal escape statute in which it finds clear evidence that Congress did not intend to depart from the ancient formulation. We believe this analytical approach precisely reverses the proper order of inquiry, this being first to examine the statute and, if it is found not to supply the answer, to turn to common law principles as they have developed over the years. *Morissette v. United States*, 342 U.S. 246 (1952); *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978). Contrary to the Government's position, an examination of the legislative history provides no support whatever for its claim that Congress "desired to retain the common law formulation of the crime." (Pet. Br. 59.)

Resort to recent common law demonstrates a hostility toward the traditional categories of general and specific intent crimes in favor of a reasoned analysis of the underlying elements of the offense involved. That is what the courts in *United States v. Nix*, 501 F.2d 516 (7th Cir. 1974), and in the *Bailey* decision below have sought to accomplish. Furthermore, several lower courts have found it unnecessary to decide the issue presented by this case because the trial courts instructed the jury that an intent to avoid confinement had to be proved, thus making it the law of the case. Finally, it is significant that even the government recognizes a higher level of intent than was required at ancient common law. This constitutes a recognition by the government that concepts of intent change with the times and actually supports our basic position in this case. The only issue between the parties is what level of intent should be required.

B. The legislative history of the federal escape statute does not demonstrate an intention by Congress to retain the common law formulation of the crime.

The Government's point of departure for its tenuous argument is the unsuccessful attempt in 1928 to enact legislation which would have made it a federal crime for a person convicted of a federal offense and committed to a federal penal or correctional institution, to "break such prison and escape therefrom * * *." 69 Cong. Rec. 1568 (1928). The Government

points out that an amendment by the Senate Judiciary Committee required that the departure be committed "with intent to escape from custody." S. Rep. No. 1505, 70th Cong. 2d Sess. 1 (1929). The bill in this form failed to gain passage by the Senate. 70 Cong. Rec. 2981 (1929).

The second prong of the Government's argument is that new legislation was introduced in the House in the following year, which omitted any mention of the previous year's Senate amendment concerning intent. As the Government concedes, this version was adopted by both houses *without debate* and enacted into law. (Pet. Br. 51.) From this meager history, the Government concludes that Congress was presented with, and chose not to adopt, an "escape statute containing a stricter intent requirement than that imposed by the common law." (Pet. Br. 59.) This analysis is unacceptable. First, the fact that Congress, in considering new legislation in 1930, failed to include a phrase from unsuccessful legislation in 1928 is devoid of any inferential value. There is no evidence that Congress gave consideration to prior bills. Secondly, the phrase in issue, "with intent to escape from custody", says nothing whatever about the level of intent required. Nor does it convey the same meaning as "escape with intent to avoid confinement". There is certainly no evidence that the 1928 version failed to win passage because of this language and less still that Congress was concerned with the issue of intent when it enacted

legislation in 1930.⁵⁸ It is clear, as the Government itself observes (Pet. Br. 59), that Congress enacted legislation "without addressing the mental element required." Any further attempt to deduce Congress's intention is sheer conjecture.

Available history concerning the enactment of the 1930 statute is similarly unilluminating. The bill which contained the escape provision was part of a program sponsored by the Attorney General for the reorganization and improved administration of the federal penal system. H.R. Rep. No. 106, 71st Cong. 2d Sess. (1930); S. Rep. No. 533, 71st Cong. 2d Sess. (1930).⁵⁹ Prior to the enactment of the Federal Escape

⁵⁸ In 1930, the number of federal prisoners had grown to 20,000 annually. The purpose of the bill was to establish a Bureau of Prisons to supervise the care and supervision of federal prisoners. The prevalent practice in those days, as described in a letter from the Attorney General, was to house federal prisoners in local jails and workhouses, many of which had become so overcrowded that local authorities refused to accept federal prisoners. In many cases, the Attorney General reported, it would be more economical for the Government to build its own facilities "rather than pay the unreasonable prices paid to local governments for a very low standard of care and subsistence." The prospect of providing federal correctional facilities demanded that provision be made against escape. H.R. Rep. No. 106, 71st Cong. 2d Sess. 2-3 (1930).

⁵⁹ The original version, set forth in the Government's brief (Pet. Br. 50-51), applies only to prison "break" which at common law required force. 69 Cong. Rec. 1568 (1928). Congress may have regarded this as too narrow. The 1930 statute applied to "escapes and attempted escapes".

statute on May 14, 1930 (c. 274, § 9, 46 Stat. 327), there was no federal statute prescribing as crimes prison breach or escape by prisoners from custody, although these were crimes under common law.⁶⁰ As described by the Attorney General:

"There is now no statutory penalty for escaping from the custody of a Federal prison or Federal officers. An escape bill passed the House during the last session but was not approved by the Senate. The provisions of this escape bill have been incorporated in sections 9 and 10 of the proposed legislation to eliminate the necessity to introducing a separate bill on the subject. A similar provision is also found in the bill which established two United States narcotics farms."

H.R. Rep. No. 106, 71st Cong. 2d Sess. 3 (1930); S. Rep. No. 533, 71st Cong. 2d Sess. 3 (1930). This is the sum and substance of the legislative history. It is totally devoid of any discussion regarding intent.

C. An intent to avoid confinement is an appropriate requirement of common law principles in prison escape

It is axiomatic that the mere omission from a federal statute of any mention of intent will not be construed as eliminating that element from the crime in question. *Morissette v. United States*, 342 U.S. at

⁶⁰ See the summary of prior statutes on escape at p. 84 n. 44 *supra*.

250, 262; cf. *Lambert v. California*, 355 U.S. 225 (1957). As the Court said in *Morissette*.

"The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to,' and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motive for public prosecution. Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a 'vicious will.'" 342 U.S. at 250-51 (footnotes omitted).

Of course, the issue here is not whether any intent is required because both parties agree that a *mens rea* is an indispensable element of the offense. Rather, the question is what *degree* of guilty mind is required. The Government takes inconsistent positions on this critical question. On the one hand, it urges the Court to apply the level of intent prescribed at common law for escape cases: unauthorized departure from lawful custody. (Pet. Br. 47-50.) In the margin, the Government quotes, with apparent approval, the trial court's instruction in this case which defined the requisite

intent in part as a "thing * * * done consciously and voluntarily and not inadvertently or accidentally." (Pet. Br. 53-54 n. 37.) On the other hand, the Government contends that "intent" is used in criminal statutes in three senses:

"(1) that the defendant performed the prohibited act deliberately, not accidentally or unconsciously; (2) that the defendant knew the act was wrongful; or (3) that the defendant did the act to further some ultimate goal." (Pet. Br. 52-53.)

Here, the Government asserts that it is the second category of intent that is germane to escape cases, apparently overlooking the fact that the jury was instructed in terms of the first type. If wrongful knowledge must be proven to establish the offense, then the jury was improperly instructed and this would constitute an independent basis for reversal. At the very least, this is a recognition by the Government that the common law undergoes modifications and what was acceptable in the Fourteenth Century does not necessarily apply in modern times.

Escape at common law holds little meaning for today because conditions are different. The common law recognized three broad classifications of prison escape under the rubric of "Offenses Against Public Justice": prison breach, escape, and rescue. See generally 2 Bishop's *New Criminal Law* 621-639 (8th ed. 1892). Prison breach was the breaking out (by force) of prison

by one confined therein.⁶¹ "Escape" had two separate meanings. One imposed liability on the jailer for voluntarily or negligently allowing a prisoner in lawful custody to leave his confinement. The other punished prisoners who left confinement without the use of force. The former was considered the more serious.⁶² Leaving confinement without the use of force was punished as a misdemeanor only. 2 Bishop's New

⁶¹ Breach of prison was regarded as a felony regardless of whether the escaped prisoner was being held for a misdemeanor or a felony. The severity of this rule was ameliorated in 1295, with the passage of the statute *De frangentibus prisonam*, 23 Edw. I (sometimes described as 1 Edw. 2 stat. 2. See J. Turner, Russell on Crimes 350 n.4 (10th ed. 1950)). Thereafter, whether prison breach was punishable as a felony or a misdemeanor depended upon the offense for which the defendant had been held. This concept is carried forward in Section 751 (a). Prison breach was a clergyable offense. 1 M. Hale, Pleas of the Crown *612; Russell on Crimes, *supra*, at 354.

⁶² 4 W. Blackstone, Commentaries *130. Negligent escape was punishable by fine, but if the officer permitted the prisoner to leave voluntarily, he was liable to be punished to the same extent as the prisoner held in custody, whether it be treason, felony or trespass. *Id.* This rule was ameliorated by requiring that the prisoner himself had to be found guilty of the offense before the jailer could be punished. According to one authority, the evidence does not show that these penalties were actually imposed. R.B. Pugh, Imprisonment in Medieval England 234 (1968).

It was common practice for gaolers to let debtors out on "furloughs" from which they sometimes failed to return. In these circumstances the gaoler was liable to the escaped prisoner's creditor and the Law Reports are filled with debt actions against

Criminal Law at 637. There is some evidence that even this penalty was not enforced.⁶³

The third offense was rescue, which came about when someone else broke into the prison and freed the

sheriffs and other custodians. See, e.g., *Raverscroft v. Eyles*, 2 Wils. K.B. 294, 95 Eng. Rep. 819 (1766); *Bonafous v. Walker*, 2 T.R. 127, 100 Eng. Rep. 69 (1787). When a gaoler permitted a prisoner to voluntarily escape, it resulted in the prisoner's discharge and he could not be retaken by the sheriff. *Atkinson v. Jameson*, 5 T.R. 25, 101 Eng. Rep. 14 (1792). Thus, in *Sheriff of Essex's Case*, Hob. 203, 80 Eng. Rep. 349 (1618), the prisoner had willingly been let go by the gaoler and had returned. When a new sheriff took office, the prisoner escaped. An action was brought by the creditor against the new sheriff. The court held that the new sheriff was not answerable and stated that when the sheriff let him go abroad voluntarily "the execution was utterly discharged, so as he could not lawfully be taken again, nor judged in execution by law, though the party would yield himself unto it, or the creditor so allowed him."

⁶³ "In order to incur the pains of 'escaping' it was necessary according to the view that eventually prevailed, for the prisoner to have 'broken' prison, an act which is once or twice called 'burglary.' If the door stood open through the negligence of the gaoler or was forced open by the activities of other prisoners or a mob without, the prisoner was himself exonerated. He had 'gone out', not 'broken out', and any culpability was transferred from him to rescuers or keepers. This seems to have been on the way to settlement in Edward IV's time. At all events a Star Chamber action of 1482 turned on the question whether an escaper had 'broken out of ward' or whether he had 'come out'. With the rescuers themselves the law dealt severely. Coke, quoting Billing and Choke, justices at the time when the foregoing distinction between 'breaking out' and 'going out' was established, declared that rescuing was always felony at common law,

prisoners. This was regarded as a serious offense, and the rescuer was punishable depending upon the offense for which the freed prisoner was held. If the person rescued was not in privity with the rescuers, he was not liable for prison breach but only for escape. This congeries of rules, developed in medieval times to deal with specific problems, cannot dictate what the elements of escape should be today.⁶⁴

No concept has been more difficult of application than the distinction between specific and general intent in the criminal law. The decision in *Bailey* is an effort to avoid labels and identify the real elements that underlie any prosecution for prison escape. The Government repeatedly departs from analysis and resurrects the terms "general" and "specific" intent in its discussion of the issues. As pointed out by the court of appeals, the word "escape" is not self-defining, and greater clarity can be achieved by abandoning the labels of specific and general intent entirely. W. LaFave & A. Scott, *Criminal Law* 202 (1972).

and reported cases confirm that opinion, though not quite unequivocally." R.B. Pugh, *Imprisonment in Medieval England* 230-31 (1968) (footnotes omitted).

⁶⁴ In fact, application of the common law would have meant that the charge against Bailey, Cooley and Cogdell should be reduced to a misdemeanor or perhaps dropped. Bailey's cell door, for example, was opened by guards and he left, as apparently did the others, through an open window in Walker's cell, employing no force. (App. 178-79; Tr. 592-95.) At common law, they would have been charged with escape and not prison breach.

In *United States v. Nix*, 501 F.2d 516 (7th Cir. 1974), the court sought to unravel the confusion that was created when labels such as specific and general intent were used to describe the mental element of the crime. Central to the court's reasoning was the difficulty of distinguishing between escape, which has traditionally been viewed as requiring a "general" intent, and attempted escape, which has been regarded as a "specific" intent crime. The court could perceive no reliable guide for distinguishing the offenses and illustrated its point by making reference to the facts of a case heard by a different panel of the court the day after Nix's appeal was argued. Nix had been drinking heavily and turned up missing from his cell. He was found 45 minutes later locked in the rear of a trailer truck parked outside the prison walls. He was indicted for attempted escape.

The defendant in the other case, one Peterson, had also been drinking heavily and left an honor camp. He was apprehended the next morning eight miles from the camp. He testified that he was trying to get back to the camp and still had a towel and some toiletries in his possession from the night before. He was charged with escape. As the court said:

"The trouble with this approach is the impossibility of drawing a line between escape and attempted escape. Was the difference between Nix' act and Peterson's the eight miles Peterson traveled? Or an overnight absence versus the hours Nix was missing? Any escapee brought to trial was ultimately unsuccessful." 501 F.2d at 518.

The court found that a mechanical application of labels attaches too great importance to the prosecutor's choice in charging a defendant and "interferes with the crucial analysis a court should make in escape cases: what constitutes the 'escape' element of the crime?" 501 F.2d at 518.

The court concluded that most cases had held that a crucial element of the offense was the intent to avoid confinement.⁶⁵ It identified two cases for the necessity

⁶⁵ 501 F.2d at 519. For example, although decided after *Nix*, Florida appellate courts have rejected the application of the common law standard and found that, where prisoners escape to avoid intolerable prison conditions, the requisite intent is lacking. In *Bavero v. State*, 347 So. 2d 781 (Fla. Dist. Ct. App. 1977), a conviction for escape was reversed because the trial court had excluded evidence that the defendant escaped due to official indifference to a severe asthmatic condition that threatened his life. The court reaffirmed its earlier holding in *Helton v. State*, 311 So. 2d 381 (Fla. Dist. Ct. App. 1975) that "there are two elements to the crime of escape: the physical act of leaving, or not being in, custody coupled with the intent to avoid lawful confinement," 347 So. 2d at 783, and observed that *Bavero* denied a wilful intent to escape. *Id.* at 784. And in *Lewis v. State*, 318 So. 2d 529 (Fla. Dist. Ct. App. 1975), *cert. denied*, 334 So. 2d 608 (Fla. 1976), it was held that the lower court had erroneously excluded evidence that the reason the defendant escaped was to obtain protection from sexual assault and not to avoid confinement. In both cases the evidence of the rationale for departure was deemed relevant to the requisite intent.

of showing intent to avoid confinement in escape prosecutions:

"The first is 'the desire to have one human element of "blameworthiness" as a basis for punishment.' The other reason is the knowledge that a prisoner who has no intent to escape—because he is grossly intoxicated, or thinks his jailer has told him to leave, or mistakes the boundaries of his confinement, or has a gun held to his head by another inmate—is not likely to endanger society as a wilful escapee is." 501 F.2d at 519.

These rationales are valid when applied to escapes from intolerable conditions. "The threatened prisoner, like the intoxicated or mistaken prisoner, does not escape because he would rather be free than incarcerated. * * * He escapes primarily to be free from the intolerable conditions that pose dangers to his personal security. Such action is difficult to characterize as 'blameworthy.'" Comment, 127 U. Pa. L. Rev., *supra* at 1159. As Blackstone recognized, such external conditions can overcome free will and force a person to leave not to gain his freedom but to avoid the threat. 4 W. Blackstone, Commentaries *27, *30. A jury might excuse such behavior when viewed in light of the conditions that motivated him to flee.

The second principle is also applicable. One who escapes to avoid death or serious bodily injury is not as likely to pose a danger either to prison personnel or to society as is one who flees for the purpose of regaining his freedom. If force is used, of course, the

individual may be punished for a separate offense. See, e.g., 18 U.S.C. §§ 111, 1114.⁶⁶

The Government apparently accepts the notion that an individual who escapes from custody either by reason of intoxication or mistake lacks the requisite intent. Therefore, whatever society's interest in preventing escapes, it is not solely to ensure that a person convicted of a crime serves out his sentence without interruption. The requirement that the prisoner possess the intent to avoid confinement is responsive to the underlying notion that, as in the case of mistake and intoxication, additional punishment should not be imposed if the prisoner did not leave in order to regain his freedom.

Rex v. Steane, [1947] K.B. 997, [1947] 1 All E.R. 813, underscores the relevant principle. The defendant

⁶⁶ 18 U.S.C. § 111 provides:

"Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than \$5,000 or imprisoned not more than three years, or both.

"Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than \$10,000 or imprisoned not more than ten years, or both."

18 U.S.C. § 1114, which makes it a federal offense to kill officers and employees of the United States specifically includes "any officer or employee of any United States penal or correctional institution."

was charged with a statutory offense of doing an "act likely to assist the enemy with intent to assist the enemy." The accused had taken part in enemy broadcasts. He alleged that he had done so in consequence of violence towards himself and of threats to himself and his family, all of whom had been in Germany. The court (Lord Goddard, C.J.) held that the jurors should have been instructed that they could infer the necessary intent from the defendant's acts only if they were convinced that the defendant had freely chosen to broadcast for the purpose of aiding the enemy rather than with the "innocent" intent to protect his family from harm. [1947] K.B. at 1006.⁶⁷ By the same token, the jury in this case could find that the respondents left the prison solely to protect their lives and not to regain their freedom.

The cases cited by the Government for the proposition that the lower federal courts have consistently

⁶⁷ The court stated:

"The proper direction to the jury in this case would have been that it was for the prosecution to prove the criminal intent, and that while the jury would be entitled to presume that intent if they thought that the act was done as the result of the free uncontrolled action of the accused, they would not be entitled to presume it, if the circumstances showed that the act was done in subjection to the power of the enemy or was as consistent with an innocent intent as with a criminal intent, for example, the innocent intent of a desire to save his wife and children from a concentration camp." [1947] K.B. at 1006, [1947] 1 All E.R. at 817.

construed § 751(a) as requiring only a "general" intent are virtually all distinguishable. In *United States v. Woodring*, 464 F.2d 1248, 1251 (10th Cir. 1972), and *United States v. Spletzer*, 535 F.2d 950, 954 (5th Cir. 1976), the trial courts actually instructed the jury that it must find an intent to avoid confinement to convict. Cf. *United States v. Snow*, 157 U.S. App. D.C. 311, 484 F.2d 811 (1973).

The Government is in error when it argues that the Court of Appeals, by confusing coercion with lack of intent, thereby eliminated the need for a defendant charged with escape to demonstrate imminent threat to his life or health, absence of legitimate alternatives, and the cessation of his unlawful activity at the earliest possible moment through surrender to appropriate authorities (Pet. Br. 67). As the court explained, at trial the prosecution can establish a *prima facie* case by showing an unauthorized departure. The burden then shifts to the defendant to adduce evidence that he left solely to avoid life-threatening conditions of confinement and not confinement itself. The prosecution then has the opportunity to rebut the defendant's evidence. The immediacy of the harm, available alternatives, and failure to return are all relevant factors that may be taken into account in determining whether the defendant's sole reason for leaving was to avoid serious bodily harm or death.

Furthermore, the court's opinion is not totally devoid of standards for determining what conditions would constitute abnormal conditions of confinement.

The examples given by the court are lack of *essential* medical treatment, homosexual attack, or beatings in reprisal for testimony in a trial. The court made clear that it did not have in mind an unpalatable dinner menu. The court's opinion does not invite "introduction of evidence of every conceivable unpleasantness that may exist within the prison." (Pet. Br. 68.) The condition must threaten the life or health of the prisoner.⁶⁸

Ultimately, the question of which standard of intent is required turns on the social utility of the competing definitions of escape. Comment, U. Pa. L. Rev., *supra* at 1166. The Government has argued that adoption of the majority's test will encourage escapes due

⁶⁸ The Government is concerned that the "specific intent" requirement will "allow juries an essentially unfettered discretion to decide what confinement conditions are sufficiently adequate to warrant escape." (Pet. Br. 69-70.) This is flatly inconsistent with its position that the choice-of-evils defense—based on the same facts—is available in the escape context if the person turns himself in immediately. In raising the specter of juries dictating to prison administrators appropriate conditions of confinement, the Government misconstrues the respondents' claim. The cases in this area invariably concern homosexual rapes, threats and beatings by guards, and lack of essential medical treatment, not generalized complaints about prison conditions. The Government's apprehension that prison policy will be dictated by juries is unfounded. *Bell v. Wolfish*, 60 L. Ed. 2d 447 (May 14, 1979) cited by the Government, concerns the constitutionality of certain conditions of pretrial detention and is not germane to this case.

to its high potential for abuse. But this argument would carry more force if the Government were taking the position that escape is never justified (see Pet. Br. pt. I). Even though the Court of Appeals refused to adopt inflexible criteria, it is apparent that the escapee's "failure or tardiness to return is one of the most significant considerations for the jury" and is "an extremely important consideration in determining the defendant's intent." Comment, 127 U. Pa. L. Rev., *supra*, at 1169.

"The fact that the jury will be required to evaluate a defendant's intent under the *Bailey* rule provides a sufficient safeguard against the possibility of a multitude of phony 'involuntary' escapes from intolerable prison conditions. A defendant must raise the issue of his voluntariness, 'by competent evidence in a trial where the testing of witnesses is subjected to the scrutiny of the factfinder who, in the course of determining the true facts of the case, would properly consider the credibility of the various witnesses.'

* * * An escapee who does not immediately turn himself in is not thereby precluded from reaching the jury. Practically, however, he must still be able to convince the jury that he had a justifiable reason for waiting. It is the exclusive role of the jury as the representative of the community to judge the credibility of a defendant's story. '[T]he framework of the fact-finding process' is the traditional means of ascertaining the truth of other defendants' tales; it should remain as the means of determining the basis of escapees' tales." Comment, 127 U. Pa. L. Rev., *supra* at 1169-1170 (footnotes and citations omitted).

Where a prisoner does immediately return and is indicted for escape, even under the Government's theory he is entitled to introduce evidence showing the circumstances of the alleged duress that caused him to leave.⁶⁹ There is no reason to believe that the jury will be diverted from the essential facts in either situation.⁷⁰

⁶⁹ Even the Government concedes that, where a prisoner escapes and promptly turns himself in to the authorities, he is entitled to have the jury consider evidence (including his own testimony) that he acted under duress or that he lacked the requisite *mens rea* to convict him for his initial departure from custody. There is no reason to believe that juries will be any less critical or less competent in evaluating evidence on these same points where the prisoner does not turn himself in immediately.

⁷⁰ "But the criminal justice system's reliance on the role of the jury does not fluctuate with the relative ease of the particular fact-finding mission, and the possibility for error is present in all trials. If the defendant truly departed solely to avoid intolerable prison conditions of a serious nature, the jury's refusal to bring in a verdict of guilty would not in any way contribute to a rash of 'unverifiable' escapes. If the prisoner escaped to avoid confinement conditions, the "traditional safeguards for determining the truth of a tale" should be sufficient to preclude him from taking advantage of the *Bailey* option. Juries should not be assumed to be less competent to assess intent to escape than they are to determine intent in other contexts. Moreover, the return requirement operates as a continual check upon the possibilities for abuse of the *Bailey* alternatives. Escape remains a continuing offense, and the consideration of return remains a highly pertinent factor. The longer the escapee stays away from custody the more difficult will be his task of

The Government's contention that "the increased number of escapes will mean an increased level of tension within the prison system, an increased disruption of prisoner discipline, and an increased danger of injury to correctional personnel and the public" (Pet. Br. 69) is a false syllogism. And its conclusion—*i.e.*, that there will be increased numbers of escapes—is not supported by any empirical evidence. (See p. 69 n. 35 *supra*.)

In the final analysis, the Government is afraid that jurors will be taken in by clever defendants. An appropriate rebuttal to "those who are forever apprehensive of the gullibility of juries is found in the English case of *Thomas v. R.*, [1937] 59 C.L.R. 279, 309:

"* * * a lack of confidence in the ability of a tribunal correctly to estimate evidence of states of mind and the like can never be sufficient ground for excluding from inquiry the most fundamental element in a rational and humane criminal code." Quoted in *Abbott v. The Queen*, [1976] 3 W.L.R. 462, 475, [1976] 3 All E.R. 140, 152 (P.C.) (Wilberforce and Edmund-Davies, JJ., dissent).

persuading the jury that his continued freedom was justifiable. The necessity of return is a constant factor which reflects society's interests." Comment, 127 U. Pa. L. Rev., *supra* at 1170-1171 (footnotes omitted).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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UNITED STATES OF AMERICA, PETITIONER

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JAMES T. COGDELL

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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*ON WRIT OF CERTIORARI TO THE
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REPLY BRIEF FOR THE UNITED STATES

The pervasive theme of respondents' brief is that they were denied the right to a jury trial on the question whether their escapes from the District of Colum-

bia Jail were the result of coercion. Despite the fact they did not present evidence to satisfy the return and immediacy requirements of the defense of duress to escape, respondents argue that the jury should have been instructed concerning duress: in their view, the absence of proof of a truly immediate threat of serious physical harm and of a prompt return to custody should simply have been factors for the jury to consider in assessing the credibility of their claims that they fled the jail under duress and without what they assert to be the requisite intent to avoid normal conditions of confinement (Resp. Br. 39, 52, 55-62, 100, 122). This argument rests upon a fundamental misperception of the duress defense when raised in an escape prosecution and of the respective roles of the trial judge and the jury in the criminal process.

As explained in our opening brief (Govt. Br. 26-34), the rule that a defendant can invoke the duress defense only if he acted from a fear of immediate and serious harm and (in the prison escape context) if he promptly surrendered to proper authorities or to a responsible intermediary is not a mere evidentiary guidepost that the jury is free to ignore in determining whether the defendant should be excused from responsibility for his criminal conduct under a broader, undefined principle of compulsion. The immediacy and return requirements are themselves substantive elements of the duress defense on which the defendant must introduce sufficient evidence to warrant submitting the defense to the jury. This respondent failed to do.

1. Respondents do not—and could not—argue that they presented evidence from which the jury could have found that they satisfied the return requirement, as that requirement has been interpreted by the case law (see Govt. Br. 29-34, 42-51).¹ Nor did the court of appeals dispute the district court's finding that they had not presented such evidence (App. 219-220; Tr. 778-779). Respondents maintain instead that prompt return should not be an essential element of the duress defense. They argue (Resp. Br. 52-71) that failure to return should be only one factor for the jury to consider in determining whether an escaped prisoner was actually motivated by fear of death or serious bodily injury at the time he fled from custody and that insistence on return in all cases therefore interferes with the jury's fact-finding function.

¹ Respondent Walker's testimony that he telephoned the FBI from an undisclosed location, even if believed, would fall significantly short of satisfying the continuing obligation to surrender or to make a bona fide effort to do so. Although respondent testified that he received no assurance that he would not be returned to the D.C. Jail, he had no right to insist on this; at most, he could have sought assurances, either personally or through a court or intermediary, that the allegedly threatening conditions at the Jail would not recur. Respondent Bailey's passing assertion (App. 175; Tr. 587) that he had someone else call the Jail falls even further short of a bona fide effort to surrender, as does respondent Cooley's ambiguous testimony about telephone calls (assuming that it refers to calls his family made to the authorities rather than to calls to Cooley (see App. 118-119; Tr. 406-407)). Respondent Cogdell did not proffer any evidence of communication with public officials.

But the duress defense—which, after all, excuses otherwise criminal activity—is properly raised in any context only if some evidence is introduced to show that the perceived threat lasted for the duration of the unlawful conduct and that, during this period, the defendant had no opportunity to avoid the threatened harm through lawful means.² The requirement that the prisoner return to custody or surrender to a public official, lawyer, court, or responsible intermediary with a view toward a prompt return to safe custody³

² See, e.g., *United States v. Wood*, 566 F.2d 1108, 1109 (9th Cir. 1977); *D'Aquino v. United States*, 192 F.2d 338, 358 n.11, 359 (9th Cir. 1951), cert. denied, 343 U.S. 935 (1952); *Gillars v. United States*, 182 F.2d 962, 976 n.14 (D.C. Cir. 1950); *R.I. Recreation Center v. Aetna Casualty & Surety Co.*, 177 F.2d 603, 605 (1st Cir. 1949); *Shannon v. United States*, 76 F.2d 490, 493 (10th Cir. 1935); *People v. Wester*, 237 Cal. App. 2d 232, 46 Cal. Rptr. 699 (1965); *M'Growther's Case*, 168 Eng. Rep. 8 (K.B. 1746); W. LaFave & A. Scott, *Handbook on Criminal Law*, § 49, at 378 (1972); Note, *Duress and the Prison Escape: A New Use for an Old Defense*, 45 S. Cal. L. Rev. 1062, 1065-1067 (1972). See also *Respublica v. McCarthy*, 2 U.S. (2 Dall.) 86 (Sup. Ct. Pa. 1781).

Contrary to respondents' claim (Resp. Br. 51), the court in *Respublica v. McCarthy* appears to have explained to the jury, in a manner largely indistinguishable from this case (App. 224-225; Tr. 806-807), why the duress defense to the charge of treason was unavailable as a matter of law if the defendant remained with the British forces for an extended period.

³ Respondents presented no evidence that these alternatives to remaining at large were unavailable or that they resorted to them. Respondents point out (Resp. Br. 22-24, 30, 79-81) that they presented or proffered evidence in an effort to explain their admitted failure to return. However, their alleged concern about conditions at the D.C. Jail that they claim

is but an application of this general principle in the specific context of prison escape. Put another way, an inmate has a continuing, affirmative obligation to submit to custody that is free of truly threatening conditions; his escape, in order to be excused, can be no more than the temporary and limited departure necessary to place himself in that custody.

In an attempt to meet these arguments, respondents rely (Resp. Br. 56-61) on several state decisions which, they suggest, have wholly discarded the return requirement as a precondition to submitting the duress defense to the jury.⁴ Two of the state cases which they cite, *People v. Luther*, 394 Mich. 619, 232 N.W. 2d 184 (1975), and *People v. Unger*, 66 Ill. 2d 333, 362 N.E. 2d 319 (1977), did hold that

led to their escape did not warrant resort to the further self-help measure of remaining at large. They had an affirmative obligation to resort to other measures to enable them to return to custody safely. Thus, their evidence, even if it furnished a credible explanation for their failure to return, would not furnish a legal excuse for their conduct.

⁴ Respondents also cite (Resp. Br. 54-55) *People v. Lovercamp*, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (1974). Contrary to respondents' assertions, however, the court in *Lovercamp* made clear that the defense is unavailable unless the defendant makes a prima facie showing that each of the elements of the defense it identified was satisfied, and it reversed the conviction only after considering the evidence as it bore on each of those elements. 43 Cal. App. 3d 831-832, 118 Cal. Rptr. at 115-116; accord, *United States v. Michelson*, 559 F.2d 567, 570 (9th Cir. 1977).

Since the filing of our opening brief, one additional jurisdiction has adopted the *Lovercamp* formulation of the duress defense in the prison escape context. See *State v. Cross*, 58 Ohio St. 482, 486, 391 N.E. 2d 319, 323 (1979).

strict compliance with all five of the conditions identified in *People v. Lovercamp*, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (1974), is not required and that the failure to satisfy these criteria was a matter for the jury to consider in determining whether the defendant in fact acted under duress. But in *People v. Luther*, the defendant was captured just eight hours after the escape; similarly, in *People v. Unger*, the defendant was apprehended only two days after his escape, and the court stressed that the defendant testified he intended to return once he found someone who could help him (66 Ill. 2d at 343, 362 N.E. 2d at 323). Under these circumstances, where the defendant may not have had a reasonable time in which to compose himself and develop a plan for surrender, it is understandable that the courts would not reject the duress defense on the ground that the defendant had not already reported to authorities.⁵ It is not at all clear that even the *Luther* and *Unger* courts would be prepared to permit a defendant to raise a duress defense if he, like respondents, made no serious effort to turn himself in for at least a month after his departure.⁶

⁵ Indeed, in *Lovercamp* itself the court dispensed with the requirement of an "immediate return" in favor of a requirement of an intent to return, because the defendant had been apprehended right after her escape. 43 Cal. App. 3d at 832, 118 Cal. Rptr. at 116.

⁶ The other state case relied upon by respondents, *Esquibel v. State*, 91 N.M. 498, 576 P.2d 1129 (1978), did reject a requirement of strict compliance with the *Lovercamp* conditions, but involved no question of the defendant's failure to return.

2. Alternatively, respondents argue (Pet. Br. 82-98)—contrary to the holding of every court of appeals that has considered the question (Govt. Br. 32-33), including the court below (Pet. App. 10a)—that a defendant cannot be guilty of escape under 18 U.S.C. 751 merely because he fails to return to custody after an initial departure that was justified by duress. The common sense point underlying the uniform holding of the cases respondents urge the Court not to follow is that Congress, in enacting Section 751, could not have intended to permit a prisoner to remain free with impunity simply because his initial departure did not give rise to criminal liability under the circumstances (Pet. App. 10a n.17; see also Comment, *From Duress to Intent: Shifting the Burden in Prison-Escape Prosecutions*, 127 U. Pa. L. Rev. 1142, 1143 (1979)).

This principle was recognized at common law as well. For example, at common law, a prisoner whose delivery from restraint was effected by a rescuer without the prisoner's connivance or assent nonetheless was guilty of escape if he voluntarily remained at liberty following the rescue. 2 J. Bishop, *Criminal Law* § 1086, at 810 (9th ed. 1923). Similarly, if a prisoner's act of departure was directed or permitted by his jailer, his absence from custody was nonetheless punishable as an escape because "it is the duty of every man to submit himself to the restraints imposed by law." *Riley v. State*, 16 Conn. 47, 51 (1843); see also *Hobert & Stroud's Case*, 79 Eng. Rep. 784 (K.B. 202 N.W. 2d 184 (1975)), and *People v. Unger*, 66

1630); 2 J. Bishop, *supra*, § 1093 at 812, § 1104 at 819.⁷

Later congressional action touching on Section 751 reflects this principle as well. In 1965, Congress authorized the Attorney General to permit prisoners to go on furlough, to place them in community treatment centers, and to authorize their participation in work release programs (18 U.S.C. 4082(c)). This

⁷ Respondents attempt to show (Resp. Br. 85-86) that Section 751 covers only the actual departure from custody by citing brief passages in five pre-1930 state cases that make reference to the act of departure. Four of the cases involved the responsibility of the public official having custody of the prisoner for permitting the prisoner to depart. In such a situation, the official's crime would be complete as soon as he permitted the prisoner to depart from his control, and there would have been no reason for the court to consider the significance of the prisoner's remaining at liberty. The fifth case, *Whitaker v. Commonwealth*, 188 Ky. 95, 221 S.W. 215 (1920), concerned a prisoner who unsuccessfully sought to justify his escape on the ground that his confinement was unlawful. He voluntarily left custody, and again there was no occasion to consider any question relating to his continued absence from custody.

Nor can respondents obtain any support from *Orth v. United States*, 252 F. 566 (4th Cir. 1918) (see Resp. Br. 87), which held that a person who had aided a prisoner after his departure from prison could not be convicted of assisting an escape. The federal statute in effect at the time separately prohibited assisting an escape and harboring a prisoner who had already escaped (*Orth v. United States, supra*, 252 F. at 570; see also 18 U.S.C. 752, 1072), and it is not surprising that the court insisted that the defendant be charged only with the crime that the evidence supported. At common law, a single offense covered both assisting the departure and the subsequent harboring. See 2 J. Bishop, *supra*, § 1102 at 818; 2 W. Hawkins, *A Treatise of the Pleas of the Crown*, ch. 29, § 26, at 448 (6th ed. 1787).

legislation specifically provides (18 U.S.C. 4082(d) (emphasis added)):

The willful failure of a prisoner to remain within the extended limits of his confinement, or to return within the time prescribed to an institution or facility designated by the Attorney General, shall be deemed an escape from custody of the Attorney General punishable as provided in chapter 35 of this title [which includes 18 U.S.C. 751-757].

This provision makes clear Congress' understanding that the concept of escape embraces the failure to return following lawful departures. S. Rep. No. 613, 89th Cong., 1st Sess. 3 (1965); *Rehabilitation of Federal Prisoners: Hearing on H.R. 6964 Before Subcom. No. 3 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess. 6 (1965). See also *United States v. Phipps*, 543 F.2d 576 (5th Cir. 1976); *United States v. Vaughn*, 446 F.2d 1317, 1318 (D.C. Cir. 1971).

Respondents argue, however (Resp. Br. 89-95), that their failure to return can give rise to criminal liability only if escape under 18 U.S.C. 751 is a "continuing offense," which, relying on cases utilizing that term in unrelated contexts, they contend it is not. Contrary to respondents' assertion, the validity of the return requirement does not depend on characterizing escape as a "continuing offense." If the crime of escape is viewed as instantaneous in nature, necessarily complete and terminated at the moment of departure, the return requirement would properly be viewed as a condition subsequent to the initial de-

parture that must be satisfied in order to invoke the affirmative defense of duress.

But a number of courts (Govt. Br. 32-33), including the court below (Pet. App. 26a n.52), have chosen to characterize escape under Section 751 as a "continuing offense" in the course of explaining that an inmate whose initial departure may be excused because occasioned by coercion (or mistake or intoxication) nonetheless has an obligation, once free, to return to custody when he is no longer subject to the coercion that led to his departure (or when he realizes his mistake, or is no longer intoxicated). This characterization of escape as an offense that continues into the period of unlawful liberty is consistent with the nature of an escape, which, unlike *attempted* escape, is consummated only if the prisoner actually attains his liberty for an appreciable period of time, "whether that be one minute or one hour or one year" (Pet. App. 62a, Wilkey, J., dissenting).

All of the cases cited by respondents that use the term "continuing offense" (Resp. Br. 89-92) were concerned with whether the defendant's conduct after his crime was complete and had given rise to criminal liability was nevertheless part of a "continuing offense" for purposes of certain procedural protections. See *Toussie v. United State*, 397 U.S. 112 (1970); *United States v. Kissel*, 218 U.S. 601 (1910); *United States v. Irvine*, 98 U.S. 450 (1878) (statute of limitations); *United States v. Cores*, 356 U.S. 405 (1958) (venue); *In re Snow*, 120 U.S. 274 (1887) (multiple prosecutions). There is no occasion for the Court to consider whether escape is a continuing

offense for any of these purposes. In the present case, if respondents' initial departure was justified by duress, their conduct had not, at the time of departure, ripened into a completed offense for which they were criminally liable. The characterization of escape as a "continuing offense" when the duress defense is raised is but one way of explaining that the prisoner's duty to submit to custody continues into the period of liberty following the excused departure and that criminal liability will attach if he fails to satisfy that duty.

3. Respondents further argue (Resp. Br. 71-82) that their indictments were defective because they did not notify respondents that the government would rely on the theory of escape as a continuing offense. But an indictment need only contain the "elements of the offense intended to be charged, 'and sufficiently apprise the defendant of what he must be prepared to meet,'" *Russell v. United States*, 369 U.S. 749, 763 (1962), quoting *Cochran and Sayre v. United States*, 157 U.S. 286, 290 (1895). Failure to return to custody voluntarily is not an essential element of the crime of escape.⁸ The offense is complete when the prisoner gains his liberty for a period of time, either brief or extended, irrespective of how that liberty is later terminated. The indictments here (App. 9-10, 15) therefore fully explained the elements of a completed crime.

⁸ Contrary to respondents' contention (Resp. Br. 75), we did not argue in our opening brief that failure to return is an element of the offense. We noted only (Govt. Br. 48-49) that an absence from custody of at least some duration is implicit in the completed crime of escape.

The failure to return became relevant only when respondents raised the affirmative defense of duress. There was no need for the indictments to anticipate affirmative defenses by containing allegations that would negate them. *United States v. Sisson*, 399 U.S. 267, 288 (1970). It does not matter for these purposes whether, as a conceptual matter, the return requirement is properly viewed as a condition subsequent that must be satisfied in order to raise the duress defense in connection with the initial departure, or whether failure to satisfy the return requirement is better viewed as an element of the "continuing offense" of escape. In either event, existing case law (see Govt. Br. 32-33) put respondents fully on notice that in order to support a duress defense, they would have to justify their failure to return promptly. Cf. *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972); *United States v. Vuitch*, 402 U.S. 62, 71-72 (1971).⁹

⁹ In any event, the language of the indictment, referring to respondents' escape "[o]n or about August 26," was broad enough to embrace a departure on August 26 that did not give rise to criminal liability until respondents chose to stay away once they were free of the coercion they claim caused their departure. *United States v. Phipps*, *supra*. Moreover, contrary to respondents' contention (Resp. Br. 76, 79), the government's arguments before the trial judge put them on notice of the manner in which it would meet respondents' duress defense. At the beginning of the trial the prosecutor announced that he would oppose any jury instruction on the defense of duress because respondents admittedly failed to report promptly to proper authorities following their departure (App. 20).

Nor is there any substance to respondents' related claim (Resp. Br. 73-78) that the jury's verdict necessarily rested on their acts of departing and that affirmance of their convictions in this Court would impermissibly rest on different acts—their failure to return to custody. Once the duress defense was removed from the case by the district court (App. 225; Tr. 806-807), there was no occasion for the jury to focus on respondents' failure to return. Affirmance of their convictions by this Court on the ground that the duress defense was properly removed from the case would therefore rest, as did their original convictions, on the jury's finding that respondents did escape and flee from the D.C. Jail on or about August 26, 1976.¹⁰

4. Respondents appear to concede (Resp. Br. 106) that their departures from the D.C. Jail were not compelled by threats of imminent death or serious bodily injury of the kind ordinarily required in duress cases. But they argue (Resp. Br. 99, 104, 106) that the traditional limitation of the duress defense to "back-to-the-wall situations" (Pet. App. 53a, Wilkey, J., dissenting) should be relaxed in the prison escape context and that, in any event, the question of the nexus between their evidence of jail conditions and their admitted escapes was for the jury to consider.

¹⁰ *Cole v. Arkansas*, 333 U.S. 196 (1948), in which the Court reversed a state supreme court's affirmance of a conviction under a different statutory provision than that under which the defendant was tried, therefore lends no support to respondents (see Resp. Br. 73). *Presnell v. Georgia*, 439 U.S. 14 (1978) (see Resp. Br. 73-75), is inapposite for the same reason.

This argument again misconceives the nature of the duress defense and the respective roles of the judge and jury in an escape case.

The widely accepted conditions set forth in *People v. Lovercamp, supra*, for the assertion of the duress defense to prison escape (Govt. Br. 29-30) represent a careful balancing of the strong societal interest in preserving prison discipline and protecting the safety of inmates, corrections officials, and the public on the one hand, and, on the other, a recognition that inmates may, in extreme situations, effectively have no choice but to escape rather than to suffer threats of death or serious physical harm. Note, *The Necessity Defense to Prison Escape After United States v. Bailey*, 65 Va. L. Rev. 359, 371 (1979). The specific requirement that the threatened harm be truly serious and immediate in order to justify a departure must therefore be viewed as a legal standard, not merely useful evidence for the jury to consider in determining whether the defendant was actually motivated by prison conditions rather than a desire to be free. Absent extreme conditions meeting the immediacy standard, the prisoner is required by law to continue to submit to confinement, and the jury accordingly, is not permitted to excuse his escape.

The logical extension of respondents' position is the elimination of any threshold quantum of proof as a condition of submitting the duress defense to the jury and, thereby, the effective elimination of a consistent and identifiable legal standard respecting the immediacy and seriousness of threatened harm

that would justify an escape. Respondents' argument is also fundamentally inconsistent with the doctrine that the defense of duress is, as a matter of law, only available when there was insufficient opportunity to avoid the threatened harm through pursuit of lawful alternatives, such as seeking protection of the courts or internal administrative remedies. See, e.g., *United States v. Wood, supra*, 566 F. 2d at 1109; *Shannon v. United States, supra*, 76 F. 2d at 493. See generally Note, *The Necessity Defense to Prison Escape After United States v. Bailey, supra*, 65 Va. L. Rev. at 371-373.

5. Respondents seek to circumvent the strict immediacy requirement of the duress defense by contending (Resp. Br. 107-126) that the escape statute requires proof of intent to avoid normal conditions of confinement and that an escapee whose initial departure is allegedly motivated by intolerable conditions therefore lacks the intent necessary to commit the crime of escape. This assertion must be rejected for at least two reasons.

First, as we discussed in our opening brief (Govt. Br. 51-72), escape is a general intent crime. The only intent required is the intent to depart or to "go beyond permitted limits" (see, e.g., R. Perkins, *Criminal Law* 504 (2d ed. 1969)).¹¹ Where, as here, the

¹¹ Respondents contend (Resp. Br. 108, 116) that the distinction between general and specific intent offenses should be abandoned. But far from impeding analysis, as respondents suggest (*ibid.*), this distinction is often important in the articulation of the mens rea element of criminal liability. See, e.g., *United States v. United States Gypsum Co.*, 438

prisoner's going "beyond permitted limits" was indisputably intentional, evidence that his motive might have been to avoid certain prison conditions is simply irrelevant to the issue of intent.¹²

U.S. 422, 444-445 (1978); *Morissette v. United States*, 342 U.S. 246, 270-271 (1952); *Dennis v. United States*, 341 U.S. 494, 500 (1951); *Screws v. United States*, 325 U.S. 91, 101-102 (1945).

Although the *Model Penal Code* does not preserve the concept of general intent, it does distinguish between intent involving only knowing commission of a criminal act and intent requiring, in addition, some particular purpose or objective. American Law Institute, *Model Penal Code* § 2.02(2) (Proposed Official Draft 1962). Escape requires only knowing or even reckless, not purposeful, conduct under the Code. *Id.* at §§ 2.02(3), 242.6(1). In the present case, of course, respondents knew that they were leaving custody, whatever may have been their purpose in doing so.

¹² The only escape cases respondents cite in support of their theory of intent are *United States v. Nix*, 501 F.2d 516 (7th Cir. 1974), and several cases decided by state courts of appeals in Florida (see Resp. Br. 118-120). The court in *Nix* defined escape as "a voluntary departure from custody with an intent to avoid confinement," 501 F.2d at 519, and concluded that gross intoxication could negate that intent, *id.* at 519-520. It is obvious that the intent the court had in mind was only the intent to leave the boundaries of confinement, not particular attributes of that confinement.

The Florida cases likewise do not support respondents. *Bravero v. State*, 347 So. 2d 781 (Fla. Dist. Ct. App. 1977), held that the defendant's testimony that he left custody to obtain medical treatment could support a finding that "he left confinement because of necessity rather than through a willful intent to avoid lawful confinement," *id.* at 784. Despite the reference to intent, it seems clear that the court was simply applying the necessity defense. That *Bravero* merely involved an application of the necessity defense is confirmed by the same court's later decision in *Watford v. State*, 353 So. 2d 1263 (Fla. Dist. Ct. App. 1978). The *Bravero* court's reference to the earlier decision in *Lewis v. State*,

More fundamentally, as Judge Wilkey concluded in his dissent, the practical result of holding the attributes of confinement to be relevant on the question of intent would be the "aboli[tion of] the salutary standards that heretofore have governed the defenses of duress and necessity" (Pet. App. 66a-67a) and the replacement of those carefully fashioned objective standards with "a nebulous and essentially deterministic view of 'voluntariness' * * * [that would permit the] [d]efendant * * * to adduce any and all evidence that may have some kind of bearing on his motivation * * *. This deterministic approach is a prescription for chaos and has been rejected in the criminal law for hundreds of years" (*id.* at 70-73a).

For these reasons, as well as those discussed in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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318 So. 2d 529 (Fla. Dist. Ct. App. 1975), also relied upon by respondents, indicates that this decision should be read in the same fashion. *Helton v. State*, 311 So. 2d 381 (Fla. Dist. Ct. App. 1975), the last of the Florida cases cited by respondents, merely held that some intent to avoid confinement is necessary—a point we do not dispute.